Canadian Transport Commission
Railway Transport Committee

Commission canadienne des transports
Comité des transports par chemin de fer

INQUIRY INTO EFFECTS IN CANADA OF U.S. RAIL DEREGULATION

Pursuant to a Request by the Minister of Transport Under Section 48, National Transportation Act

APPENDICES C AND D

Canada

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IN CANADA
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Pursuant to a Request
by the Minister of Transport
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Appendices C and D

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This volume contains Appendices C and D to the Railway Transport Committee's report to the Minister of Transport concerning its inquiry into effects in Canada of U.S. rail deregulation.

The Appendices present a thorough review of both the legal background to issues raised during the inquiry and the evidence generated in the course of that inquiry. Such a complete presentation of the materials and arguments presented to the inquiry panel could not be prepared in time to meet the deadline accepted for a report to the Minister. It may be useful in providing context for the recommendations contained in that report, especially for those who, unlike the hearing panel, did not have the benefit of the direct evidence on which these Appendices are based.

Transcripts of the hearings as well as exhibits and submissions received during those hearings are on public file and available for examination at the Commission's offices in Hull.

APPENDIX C

LEGAL AND HISTORICAL BACKGROUND

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INTRODUCTION

The purpose of this appendix is to provide an historical context in which to situate the freight rate regulation of international railway movements. This historical context necessarily involves a brief outline of the major policy developments in the general area of freight rate regulation, as well as a specific consideration of those sections of the Railway Act and the National Transportation Act which were at issue during the course of the recent hearings because of their direct impact on international rail movements. This section of the report will be divided into two parts:

I Freight Rate Regulation in Canada

  (a) Post 1903
  (b) Post 1951
  (c) Post 1967

II International Railway Movements

  (a) Regulatory Practice
  (b) Statutory Regulation
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In certain respects, the Railway Act is an historical constant; the structure and the wording of the Act are, in substance, little changed from the initial Railway Act of 1903 which abolished the Railway Committee of the Privy Council and vested its powers in the Board of Railway Commissioners for Canada. Evidence of the historical durability of certain sections of the Act is the fact that it provided the foundation for Parts I and IV of the National Transportation Act of 1967.

In other respects, the Railway Act has been responsive to change. Particularly in the area of freight rate regulation, the Act has been subject to fundamental amendment, principally to reflect the recommendations of successive Royal Commissions on Transportation.

During the recent hearings, the point was emphasized that Canadian and American railway regulatory policies as developed over the years, if not identical, were complementary prior to the enactment of the Staggers Rail Act of 1980 in the U.S. A fundamental issue was whether American rail deregulation upset the compatibility of the two systems; whether, on international traffic, the American policy of, inter alia, regulatory exemption, intramodal competition and confidential transportation contracts could still mesh with the Canadian policy of intermodal competition and rate transparency.

I Freight Rate Regulation in Canada

In August 1886, a Royal Commission on Railways was created to consider "the expediency of having a general Railway Law", "the advisability of creating a Commission with power to determine matters in dispute between Railway Corporations, and generally to regulate the system of railway management in its relation to the commerce of the country". The report of the Commission, chaired by A.T. Galt, was made in 1888 after extensive comparative study of railway regulation throughout the world, especially in the United States. In fact, the report noted the importance of maintaining and developing the foreign traffic passing through Canada in a wise system of compatible railway management. The report rejected "the creation of a Commission, independent of government control, with practically irresponsible authority" in favour of such extension of the powers of the Railway Committee of the Privy Council as required to properly administer the proposed general railway law.

(a) Post 1903

Prior to the 1951 report of the Turgeon Commission, the regulation of rail freight rates had not been the subject of any comprehensive legislative reform; regulation was still structured on the Railway Act of 1903. Using the statute consolidation of 1927 as a point of departure, the central statutory provision was found under the heading "Traffic, Tolls and Tariffs": "equality as to tolls and facilities:

> (1) All tolls shall always under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars or conveyances, passing over the same line or route, be charged equally to all persons and at the same rate whether by weight, mileage or otherwise.
>
> (2) No reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person or company travelling upon or using the railway.
>
> (3) The tolls for carload quantities or longer distances, may be proportionately less than the tolls for less than carload quantities, or shorter distances, if such tolls are, under substantially similar circumstances, charged equally to all persons.
>
> (4) No toll shall be charged that unjustly discriminates between different localities.
>
> (5) The Board shall not approve or allow any toll, that for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line or route is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that, owing to competition, it is expedient to allow such toll.

...

: R.S.C. 1927 c. 170 s. 314

Also, the Act required that the same equality apply to facilities for traffic:

> (1) All railway companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling stock.
>
> (2) Such facilities so to be afforded shall include the due and reasonable receiving, forwarding and delivering by the company, at the request of any other company, of through traffic, and in the case of goods shipped therein, to and from the railway of such other company, at a through rate; and also the due and reasonable receiving, forwarding and delivering by the company, at the request of any person interested in through traffic, of such traffic at through rates.
>
> (3) No company shall
>
> (a) make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever;
>
> (b) by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person or company;
>
> (c) subject any particular person, or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever; or
>
> (d) so distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic that may originate on its railway destined to a point on another railway in Canada with which it connects.

...

: R.S.C. 1927, c. 170, s. 316

The task of determining whether traffic had been carried under "substantially similar circumstances and conditions" and necessarily, whether there had been, in any case, "unjust discrimination, or undue or unreasonable preference or prejudice" was that of the Board: s.317(1).

The general provisions relating to tariffs of tolls were correspondingly as broad. The Board had the power "to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require": s. 325(5).

Where the Board was of the view that a tariff, or portion thereof, was unjust or unreasonable, the Board had the power to disallow the tariff, order a satisfactory substitute tariff or prescribe other tolls in lieu of the tolls so disallowed: s. 325(1). The Board equally had the power, either on application or of its own motion, to suspend or postpone the effective date of the tariff: s. 325(2).

Freight tariffs, for their part, were divided into three classes: standard, special and competitive freight tariffs. Standard freight tariffs were to be filed with, and subject to the approval of, the Board. Once approved, the standard freight tariffs were required to be published "in at least two consecutive weekly issues of Canada Gazette": s. 330. Special Freight tariffs were subject to a statutory notice period of three days, where a reduction was sought, and a statutory notice period of 30 days, where any such special freight tariff "advanced" any previously authorized toll: s. 331.

Joint tariffs, on a continuous route in Canada, were subject to a divided filing requirement; the "initial" company was required to file the tariff with the Board, and the "other" company(s) were required to "promptly notify the Board" of their concurrence to the joint tariff: s. 336. Joint tariffs on international movements were the subject of two provisions. Section 338 concerned a continuous route from any point in Canada to the U.S., as well as overhead traffic with a Canadian origin and destination; the section required that the participating carriers, "whether Canadian or foreign" file a joint tariff with the Board. Section 339 concerned a continuous route from any point in the U.S. into Canada, as well as overhead traffic with an American origin and destination; the section required that "a joint tariff for such continuous route shall be duly filed with the Board". The section did not explicitly state, as did section 338, which of the "several companies" were to file the joint tariff. Finally, section 341 stated that joint tariffs were subject to the same filing and publication requirements as local tariffs; one notes that no mention was made of the role of agents or tariff bureaux.

(b) Post 1951

With one exception, that part of the Railway Act entitled "Traffic, Tolls and Tariffs" appeared in the 1952 statute consolidation with the same structure and language as it did in the 1927 statute consolidation. The one exception was the amendment of those sections relating to freight tariffs; of primary importance was the insertion of the "National Freight Rates Policy":

> 336.(1) It is hereby declared to be the national freight rates policy that, subject to the exceptions specified in subsection (4), every railway company shall, so far as is reasonably possible, in respect of all freight traffic of the same description, and carried on or upon the like kind of cars or conveyances, passing over all lines or routes of the company in Canada, charge tolls to all persons at the same rate, whether by weight, mileage or otherwise.
>
> ...
>
> (4) Subsections (1), (2) and (3) are subject to subsection (6) of section 328 of this Act and to the Maritime Freight Rates Act, and do not apply in respect of
>
> (a) joint interntional rates between points in Canada and points in the United States of America;
>
> (b) rates on export and import traffic through Canadian ports, where in practice such rates bear a fixed and long-standing relationship with rates on similar traffic through ports in the United States of America;
>
> (c) competitive rates;
>
> (d) agreed charges authorized by the Board under Part IV of the Transport Act.
>
> ...

The essence of the policy was that rates on any class or kind of freight should be equalized across Canada; the general policy was, however, subject to exceptions which involved a significant quantity of traffic. The national freight rates policy was an addition to the Act reinforcing the provision requiring equality of tolls in substantially similar circumstances.

One of the exceptions to the national freight rates policy was in the area of agreed charges, an area of railway pricing which first recognized competition from other modes of transport as an important factor in the determination of appropriate rates.

The use of these rates first became permissible with the passage of the Transport Act in 1938. This legislation gave the railways a pricing tool to meet the growing truck competition. The agreed charge, which was negotiated between the railway and shipper, gave the shipper a discount in exchange for committing most or all of his traffic to the railway. The fact that the legislation covering agreed charges was contained in an act separate from the Railway Act freed these rates from many of the restrictions which applied to other rates. However, it was still necessary to obtain Board approval for the agreed charge. The Board was then required to determine that a competitive rate would not be sufficient for the situation. For this reason the rates were not very popular until these requirements were eliminated from the Transport Act in 1955. This change, along with others, was based on the recommendations of the Royal Commission on Agreed Charges chaired by W.F.A. Turgeon. Today, the use of agreed charges has declined significantly.

The national freight rates policy, as contained in section 336, was followed with another new provision, section 337, which came to be known as the "one and one-third rule". This section established that the toll applicable to freight traffic having its origin or destination in the Prairie Provinces was not to exceed the transcontinental freight rate by more than one-third. What is readily apparent is, that whatever the impact of these amendments, their focus was on domestic freight rates. International movements were beyond the scope of the one and one-third rule and "joint international rates" were specifically exempt from the National Freight Rates Policy.

What is significant is the manner in which this amendment to the Act concerning freight tariffs came about. These amendments endorsed the recommendations of the Royal Commission on Transportation (1949-51) chaired by the Honourable W.F.A. Turgeon. The terms of reference of the inquiry stated:

> That, without restricting the generality of the above terms of reference, the Commissioners should in particular:
>
> (a) Review and report upon the effect, if any, of economic, geographic or other disadvantages under which certain sections of Canada find themselves in relation to the various transportation services therein, and recommend what measures should be initiated in order that the national transportation policy may best serve the general economic well-being of all Canada;
>
> (b) Review the Railway Act with respect to such matters as guidance to the Board in general freight rate revisions, competitive rates, international rates, etc., and recommend such amendments therein as may appear to them to be advisable;
>
> ...

Order in Council, P.C. 6033 (December 29, 1948)

The equalization of the "economic, geographic or other disadvantage under which certain section of Canada find themselves" was the thrust of the National Freight Rates Policy, in conjunction with the one and one-third rule. The Turgeon Commission's recommendations as to international rates were not as enterprising:

> No legislative amendment is to be recommended with respect to international rates or to the establishment of a Joint International Board to deal with them or to alter the Board's present practice in dealing with such rates.
>
> : Report at 105

The reference to the "Board's present practice" requires some elaboration. Freight rates in general, given the Board's power "to fix, determine and enforce just and reasonable tolls" were subject to general percentage rate increases, otherwise known as "horizontal increases". Although the statutory infrastructure was in place beginning in 1903, apart from the few changes made in the rate structure pursuant to the Board's General Freight Rate Investigation of 1927, the issue of freight rate increases subsided in importance for a time. The Great War, the Depression, and World War II were characterized by a lean economic climate coupled with extraordinary statutory controls on freight rates. War-induced demand for railway services ended and wage and price controls were lifted in 1946. In 1948, the railways applied to the Board of Transport Commissioners for a general increase in tolls, the first since 1920. The applications increased apace; fourteen general rate increases were approved in the years 1948 to 1958. In 1959, the railways applied for a further increase of 12 percent. The government of the day in effect assumed jurisdiction over the application by enacting the Freight Rates Reduction Act, S.C. 1959, c.27, s.3, which denied the application and provided a roll-back in freight rates. At the same time, the government appointed another Royal Commission on Transportation to study the freight rate structure. The rate freeze imposed in 1959 was extended by a new government in 1960, and remained in force until 1967.

Significantly, by Board practice, freight rates on international movements were beyond the scope of the general percentage rate increases.

(c) Post '67

The amendments to the Railway Act, effected by the National Transportation Act of 1967, were fundamental. The concept of equality of tolls, present since 1903, and the concept of equalization, envisaged in 1951, were both removed from the Act. The National Transportation Policy was enacted in their place, premised on "the ability of any mode of transport to compete freely with any other mode of transport", an ability which recognized the "disadvantage inherent in the location and volume of traffic" in the establishment of tolls. Also written out of the Railway Act was the Commission's general power to disallow, suspend or prescribe tolls. The residue of the Board's former power under the Railway Act to determine questions of fact concerning undue preference, discrimination or prejudice was placed in the National Transportation Act, in the current section 23. The Commission's jurisdiction over any rate established by a carrier pursuant to the Railway Act is contingent upon an application being made to the Commission, the presentation of a *prima facie* case, an investigation of the rate, and a finding of an effect "prejudicial to the public interest" in which case the Commission may, among other things, order "the carrier to remove the prejudicial feature in the relevant tolls...". s.23(4) National Transportation Act.

The reliance on competition as a means of rate regulation finds its origin in the recommendation of the Royal Commission on Transportation (1959-61) chaired by M.A. MacPherson. The Commission's terms of reference were broad:

> The Commission shall consider and report upon:
>
> (a) inequities in the freight rate structure, their incidence upon the various regions of Canada and the legislative and other changes that can and should be made, in furtherance of national economic policy, to remove or alleviate such inequities;
>
> (b) the obligations and limitations imposed upon railways by law for reasons of public policy, and what can and should be done to ensure a more equitable distribution of any burden which may be found to result therefrom;
>
> (c) the possibilities of achieving more economical and efficient railway transportation;
>
> ...
>
> : Order-in-Council, P.C. 1959-57 (May 13, 1959)

One notes that the terms of reference did not specifically mention the area of international rail movements.

The Commission's recommendations noting "the reality of competition in transportation", particularly motor transportation, squarely set a pricing system based on the principle of monopoly against a pricing system determined by cost, and in so doing demonstrated the economic undesirability of equalization. The recommendations, under the heading "Competition and National Transportation Policy", noted:

> The presence of competition forces the recognition that rates for many movements will be set to meet particular competitive situations. This alone destroys any policy

> which attempts to ensure that shippers over any very wide area can expect to be given "equalized" rates. Equalization may be effective under conditions of monopoly but the intervention of competition renders equalization ineffective. (Vol. II p.62)
>
> ...
>
> Under competitive conditions a wholesale re-evaluation of policy becomes necessary. Traditional measures to protect against "discrimination" in freight rates are in effect being set aside by competition. Preserving such measures on the statute books limits the power of railways properly to compete. The assumption that the railways have power to establish rates which are "just and reasonable" by criteria of the monopolistic period is erroneous. These terms lose all meaning as the criteria are eroded away by competition. To persist in a policy which enforces standards of behaviour on one mode but not on its competitors is to assume an Olympian position, with powers to determine the economic fate of industries and regions. This is no longer realistic. (Vol. II p.63)
>
> ...
>
> Under this philosophy of free competition, the regulatory authority takes little initiative. Under the objectives of the National Transportation Policy it is our conclusion that the regulatory powers of the nation shall continue to be charged with responsibility for the upper and lower limits of railway rating under the pertinent circumstances of each. (Vol. II p.65)

The above quotation referred to the remnants of monopolistic pricing powers and mentioned the responsibilities of the regulatory body "for the upper and lower limits of railway rating". As to the lower limit, the Railway Act was amended to state that "all freight rates shall be compensatory" (s.276) and the Commission was given jurisdiction to disallow non-compensatory rates (s. 277). As to the upper limit, the captive shipper -- "a shipper of goods for which in respect of those goods there is no alternative, effective and competitive service by a common carrier other than a rail carrier or carriers" -- may apply to the Commission to have the probable range of a fixed rate established; a fixed rate expressed as a percentage beyond the variable cost of the carriage (s.278).

One notes that this maximum rate regulation was envisaged by the MacPherson Report to apply only in a situation of significant monopoly, to so-called captive shippers. The current section 23 National Transportation Act provisions concerning acts and rates prejudicial to the public interest were formulated some five years later, during the scrutiny of the then Bill

C-231 before the Standing Committee on Transport and Communications: see Vol. 41, Minutes of Proceedings, at p.2907 (November 24, 1966).

II International Rail Movements

(a) Regulatory Practice

As noted above, within that part of the Railway Act entitled "Traffic, Tolls and Tariffs", the section on Freight Traffic has been subject to fundamental amendment following the recommendations of successive Royal Commissions. The section on Joint Tariffs has not been subject to substantial change.

The Turgeon Commission report provides an excellent summary of the practice adopted in Canada towards changes in international freight rates. Under the heading "International Rates" the report stated:

> 7. INTERNATIONAL RATES
>
> There are three types of International Rates:
>
> Type I Rates on traffic between points in Canada and points in the United States in either direction;
>
> Type II Rates on traffic between two points in the United States through Canada; and
>
> Type III Rates on traffic between two points in Canada through the United States.
>
> As to Type I: These rates must be published in printed tariffs which are "filed" with the Board of Transport Commissioners in Canada and with the Interstate Commerce Commission in the United States. In neither country are the railways compelled by law to agree to joint international rates; the agreement is voluntary, but when made, the tariffs publishing such rates must be filed. They then become subject to both the Railway Act of Canada and the Interstate Commerce Act of the United States. The Board controls the rate over such portion of the through rate as lies within Canada, and the Commission controls the rates over the portion in the United States.
>
> The legal jurisdiction over such rates is thus divided, neither country having complete control over the entire rate in an international rate tariff.

As to Type II: The freight tariff must be filed with both regulatory bodies by virtue of the provisions of section 339 of the Railway Act and the provisions of the Interstate Commerce Act.

As to Type III: The freight tariff must be filed only with the Board in Canada, as the Interstate Commerce Act does not require such tariffs to be filed with the Commission.

In this section Types I and III are dealt with.

Where there are no joint international rates the traffic is carried at the lowest combination of local rates.

The publication of joint international rates avoids the difficulty of ascertaining the lowest of numerous combinations of rates to and from various junction points, thus simplifying the quoting of rates. It also usually results in lower charges, thus stimulating international traffic.

THE PRESENT SITUATION

Where the amount of international traffic is large, joint international rates are generally published, e.g., between points in Eastern Canada and points in the Eastern United States. On the other hand where there is a relatively small flow of international traffic there are few international rates, e.g., between Western Canada and the United States, and between Canada and the Southern and Western States.

Along the Atlantic and Pacific coasts of both countries many international rates are published because of the common interest of railways in meeting intercoastal water competition.

As joint international rates are the result of the desire of railways in two different countries to institute them, and can only be published after an agreement, there is not jurisdiction in either regulatory body to compel their institution. The joint rates come about only where, in the opinion of the railways in the two countries, there is a sufficient volume of traffic to warrant them or when to meet competition the railways of both countries agree upon and publish international rates tariffs.

When rate changes are authorized by the Interstate Commerce Commission, the practice is, and for a long time has been, for the Board to permit increases or reductions in the Canadian portion of the international rates (a) at the same time and (b) of equivalent amount as granted by the Commission on the United States portion of the rates.

General rate increases within the United States may, and usually do, take place before similar increases occur within Canada, and the amount of the increase in the United States may be greater than the increase in Canada. Consequently international rates are often raised more than domestic rates and the Canadian portion of the international rate is allowed by the Board even though the rate of increase is higher than on other rates in Canada.

Since a joint international rate is one unit, and not divisible at the boundary in so far as the shipper is concerned, the whole through rate must be advanced in both countries at the same time to keep the international rate on a parity with other rates within the United States. If this practice were not followed the American shippers would be discriminated against within their own country by the lower international rates on shipments to or from Canada.

...

The total charges and therefore the relationship between the various gateways would be disturbed, and the flow of trade across the border thrown into a state of confusion.

...

CONCLUSIONS

1. No one was able to suggest any legislative remedy which would cure any of the complaints, and as fast as can be determined all admit the importance and necessity of joint international rates to shippers, consignees and railways.

2. The Board's present practice of permitting the increases granted by the Interstate Commerce Commission to be applied on the Canadian portion of the through rate appears to be the only feasible one to follow. To do otherwise would mean the withdrawal by American railroads from joint international rates. That this is evident is perhaps best illustrated by the fact that Boards of Trade in Montreal and Toronto have actually joined in applications to the Board favouring this procedure in order to preserve the continuity of international traffic.

> 3. While the publication of joint international rates between all points in Canada and all points in the United States would be most desirable, it cannot be brought about by legislation or regulation in Canada for the simple reason that American carriers cannot be compelled to join in international rates against their will.
>
> 4. Publication of lower proportional rates between interior points in Canada and the international boundary on traffic destined to or received from the United States would only result in reducing railway revenue in Canada without a corresponding reduction by proportional rates within the United States.
>
> ...
>
> RECOMMENDATIONS
>
> No legislative amendment is to be recommended with respect to international rates or to the establishment of a Joint International Board to deal with them or to alter the Board's present practice in dealing with such rates.
>
> : pp. 102-105.

In short, it was the established practice of the Board to grant increases or reductions in rates on the Canadian portion of the international rates whenever the Interstate Commerce Commission decided to do so on the U.S. portion of the rate. The rate adjustment in Canada was "automatic" in that the process was outside of the scope of an application for a general percentage rate increase and the adjustment came into force independent of the statutory notice periods set out in the Railway Act. The congruity that existed between Canadian and American rail regulatory policy was accomplished when the Board followed and adopted ICC initiatives on international movements.

The issues inherent in the trans-border flow of freight involving the various rail gateways were later the subject of a Board inquiry begun in 1957:

> The Board desires to obtain the view of all parties as to the following questions:
>
> 1. Should the Board continue to grant short notice permission to rail lines to permit uniform application of increased rates on the same effective date as granted by the Interstate Commerce Commission? or,

> 2. Should international rate changes be initiated only by the filing of tariff schedules on thirty days notice insofar as the Board is concerned?
>
> 3. What other method of dealing with such matters is suggested?

: In re: Freight Rates between Canada and the United States, 48 J.O.R.R. 337 at 339 (15 November 1958).

The Board inquiry, much like the Turgeon Commission, concluded that, given the complexity of the factors involved in international railway movements, no changes to the traditional practice would be recommended.

In a subsequent judgement, under the heading Distortions in the Freight Rate Structure, the Board noted:

> International rates
>
> This heading broadly includes three types of rates, (1) joint through rates which span the international boundary without break thereat; (2) rates which are commonly called "overhead" and apply to the United States traffic passing through Canada over Canadian railways; and (3) export and import rates between Canadian points and Canadian ports applicable on traffic to or from overseas where the rates are on a parity relationship with similar rates to or from United States ports.
>
> The joint international rates described in type (1) above are, on the average, applicable to longer hauls within the United States than in Canada; they must and do reflect this condition as well as relationships with like rates wholly within the United States. To maintain such relationships and also the joint rates themselves, such rates have been subjected since 1946 to substantially the same level of increase as was provided in each of seven general increase cases before the Interstate Commerce Commission in the so-called "Ex Parte" proceedings.
>
> ...
>
> The absence of any proposal in the present instance to apply increases to the three types of rates mentioned above is of necessity bound up with the underlying structure of such rates and the fact that this traffic has incurred substantial rate increases separate and apart from the general increases applied to intra-Canadian traffic.
>
> ...

: Ibid p.355 et seq.

The congruity between the two countries' rail regulatory policies was also a function of the congruity of their enabling legislation. The Interstate Commerce Act dates from 1887, and accordingly may have served as a readily accessible model to Parliament in drafting and amending the Railway Act of 1906.

The Act to Regulate Commerce created the Interstate Commerce Commission in 1887: 24 stat. 379. With respect to rates, its principal provisions were the prohibition of rates that were unjust and unreasonable and rates which were unjustly discriminatory or unduly prejudicial to persons or localities. The publication of rates in tariffs to be open to public inspection was required and the Commission was given the power to declare rates to be unlawful if they were found to violate the substantial rate provisions.

By the Elkins Act of 1903 the published tariff was made the standard of lawfulness and every departure therefrom was declared to be a misdemeanor: 32 Stat. 847. The Act added significance to the Commission's power in enforcing equality of charges and open dealing. The Elkins Act did not go so far as to allow that the published tariffs be subject to adjustment to a reasonable and non-discriminatory basis by order of the Commission. This matter was dealt with by the Hepburn Amendments of 1906 which contained sweeping provisions enlarging the Commission's jurisdiction to reach various instrumentalities of transportation and incidental services which were handy sources of discrimination: 34 Stat. 584. But the real importance of these amendments was found in the delegation of rate-making power to the Commission and in the procedural reforms which made the decisions of the Commission effective and final. The Commission, upon complaint and after hearing, was empowered not only to condemn existing rates as unreasonable and discriminatory, but also to prescribe lawful rates for the future.

The Mann-Elkins Act of 1910 empowered the Commission to suspend proposed changes in rates before they go into effect: 36 Stat. 539. This was a power of great importance especially since the courts did not readily review the Commission's use thereof, with the result that suspension could be granted or denied in the Commission's sole discretion. The railroad carriers were potentially deprived of the benefits of the new rate for a period as long as seven months, with no recompense to the carrier even though the rate suspended was ultimately held to be lawful.

To this point, the legislation, the original Act. and its amendments were designed to eliminate railroad abuses by imposing restraints on railroad practices, centering principally in discriminatory and excessive rate adjustments. No responsibilities for seeing that rates as a whole were adequate to attract the capital necessary to provide efficient transportation service were laid upon the Commission.

The Transportation Act of 1920 grew out of the need to take a more positive approach to the revenue requirements of the railroads: 41 Stat. 456.

In sum, the Interstate Commerce Act had been amended through a series of congressional initiatives, the effect being that by 1920 the powers of the Interstate Commerce Commission had expanded and were closely analogous to the powers of the Board of Railway Commissioners.

II (b) Joint Tariff Regulation

(i) Joint Tariffs

The Joint Tariff sections of that part of the Railway Act entitled "Traffic Tolls and Tariffs" have not been subject to significant amendment, with one exception, the sections read today as they have since 1906. The exception relates to an amendment recognizing the role of a duly authorized agent in the filing of a joint tariff. The Joint Tariff "part" of the Act distinguishes between joint rates on domestic traffic, international traffic and overhead traffic. Joint tariffs on a continuous route wholly within Canada require the concurrence of the several companies involved: s.284(1). In default thereof, application may be made by any party to have the Commission determine the rate, the route, the division, and the effective date of a joint tariff: section 285(1).

Joint tariffs on international movements, including overhead traffic, are subject to two sections. Section 286(1) concerns a continuous route originating in Canada and terminating in the U.S. as well as overhead traffic with a Canadian origin and destination, but passing through the U.S.; the section states that the several companies, whether Canadian or foreign, "shall file with the Commission a joint tariff for such continuous route". The section does not specifically state that the several companies shall agree to the filed joint tariff. However, the section does require the "several companies", including foreign companies, to file the joint tariff. One may argue, as was done in the Supreme Court of Canada, that the filing requirement was imposed "probably in order that concurrence of all may be evidenced by their participation in the act of filing which takes place with the Board itself": Grand Trunk Ry. Co. v. British American Oil Co. (1911), 43 S.C.R. 311; 11 C.R.C. 118 at 135 per Anglin J. It is clear from this decision that although the Railway Act does not compel a foreign carrier to file a joint international through rate, once the foreign carrier does file, it becomes subject to the jurisdiction of the Commission.

Section 287 concerns a continuous route either originating in the U.S. destined for Canada or originating and terminating in the U.S. but passing through Canada; the section states that "a joint tariff for such continuous route shall be duly filed with the Commission". Again specific reference is not made to agreement to, or concurrence in, the joint tariff. Moreover, the section does not make reference, as does section 286, to the "several companies" and their respective roles, if any, in the filing of the joint tariff.

The very delicate and difficult questions which arose upon the construction of the clauses of the Railway Act relating to joint international traffic were the subject of an appeal to the Supreme Court of Canada in 1910: Grand Trunk Ry. Co. v. British American Oil Co. (1911)

43 S.C.R. 311; 11 C.R.C. 118. The Court had to consider a decision of the Board ordering a Canadian carrier to refund to the shipper what was in effect a "surcharge" on the Canadian division of the joint international rate. The railway movement at issue had originated in the United States and the legal rate chargeable on the shipment, pursuant to the tariff duly filed by the American carrier with the Board, was below the rate charged by the Canadian carrier. The court held that, where the international railway movement originated in the U.S. and the originating American carrier had voluntarily submitted to the jurisdiction of the Board by filing the joint tariff, then the concurrence of the Canadian carrier to the rate was not required in order for the Board to determine the legal tariff in effect in Canada. In this case, the Canadian carriers did not concur in a rate adjustment which reduced the applicable rate. One recalls that at this time, and until 1967, the Board had the power to determine and prescribe the legal tariffs of tolls charged by the Canadian railways. Of particular significance is the discussion of the distinction between the filing requirements imposed by the Act on international movements originating in either Canada or the United States, and its consequent effect on jurisdiction. On the subject of what is currently section 286, the judgment notes:

> So in dealing with the international traffic originating in Canada, section 335 expressly provides that the "several companies" foreign as well as Canadian, "shall file with the Board a joint tariff for such continuous route". Agreement is here again made expressly necessary and the reason is apparent. The Board could not exercise jurisdiction over the foreign corporation except where it submitted to their jurisdiction. With respect, therefore, to international traffic originating in Canada the willingness of the Canadian company initiating the traffic was not considered sufficient. The foreign company not subject to the Board's jurisdiction must file its agreement with such joint tariff. That being done the Board then would have jurisdiction to allow it. The ground upon which Parliament apparently legislated with respect to this special international traffic originating in Canada was in order to give the Board full control over it; the tariff filed must be so filed not only with the consent of the Canadian company originating the traffic, but with the foreign company intended to be bound by it.
>
> : 43 S.C.R. 311 at 317; 11 C.R.C. 118 at 124.

In the next paragraph, the judgment notes the linguistic distinction in what is presently section 287:

> But in dealing with traffic originating in a foreign country (section 336) the language is entirely changed. All words indicating the necessity of specific agreement by all interested roads before filing such a tariff are

> omitted and the simple fact required to give the Board jurisdiction over an international traffic obviously not within their jurisdiction was the due "filing of a joint tariff for such continuous route". Such joint tariff was not necessarily to be one agreed to beforehand by the Canadian company to be effected by it because, I assume, of the fact that such company was already within the jurisdiction of the Board. But whatever the reason was the several agreements were not required as they were in the two previous cases. What was essential to get was control over the initiating foreign company and that was obtained, as I construe the section, by providing that they should file the joint tariff. It was obviously the company initiating the traffic that should in the first instance file the proposed tariff and that being done and jurisdiction so gained then the Board could at any time at the instance of the Canadian company or any one else interested either allow or disallow the tariff proposed or, possibly, supersede it. On the latter point of superseding it and imposing another of its own I offer no opinion as the question does not arise here.

Clearly the regulation of joint rates on international railway movements required a certain flexibility. In practice, on railway movements originating in the United States, the Board's actions could be interpreted as deferring to the decisions of Interstate Commerce Commission. In theory, the Board had full jurisdiction over a railway movement once it crossed the international boundary into Canada. The formal jurisdiction of the regulatory bodies on both sides of the border recognized the practical disincentives that existed if their respective decisions over what constituted a just and reasonable rate were to differ.

This de facto concurrent jurisdiction in both countries was the subject of a Board decision in 1920. Indeed, the Board commented on what it termed the "informal modus vivendi" that existed between the Board and the Interstate Commerce Commission by citing a decision of the ICC:

> For some years joint through rates from Canadian points to interior domestic points have been regarded as being within the general control of the Canadian Commission, while joint rates from domestic points to interior Canadian points are left under the general control of this Commission. The origin and scope of this understanding between the two Commissions is explained in International Paper Co. v. D. & H. Co., 33 I.C.C. 270. It is also referred to in Rates on High Explosives to G.T. Ry. System Stations, 33 I.C.C., 567, and was followed in Aetna Powder Co. v. Wabash R.R. Co., 39 I.C.C. 199. It has proved to be an efficient working arrangement and will not be departed from by this Commission on light grounds, although we have felt it necessary to

> point out that our jurisdiction extends to the service of our domestic lines performed within the United States and to the charges therefor and that where circumstances seem to make such a course necessary we would require the domestic carrier to withdraw from participation in joint through rates to and from Canada interior points and to establish a local or proportional rate to and from the border.
>
> : see Consolidated Gas v. Cdn. Pacific Ry. Co. (1920), 26 C.R.C. 11 at 18.

The Board noted that this informal customary practice in no way prevented either regulatory body from exercising its jurisdiction over the portion of the international haul within its respective borders.

The headnote to the Board decision stated, "in actual practice, the Board usually deals with international joint tariffs of tolls for an outbound movement only and does not interfere with a tariff properly filed under United States practice for the inbound movement". This observation is consistent with the findings of the Turgeon Commission (noted above) whereby the Board gave immediate effect in Canada to increases to joint international rates approved by the ICC.

II (b)(i) Special Appeal and Investigation (s. 23 NTA)

As previously mentioned, the concept of equality of tolls was removed from the Railway Act in 1967. The National Transportation Act repealed several sections of the Railway Act pertaining to undue and unreasonable discrimination -- R.S.C. 1952. c. 234 section 317, 319(3), 320(1), 322-24, 328 -- and enacted section 23 National Transportation Act in their stead. The concept of maximum railway rate regulation for other than captive shippers was not among the recommendations of the MacPherson Commission; maximum rate regulation was inconsistent with the "era of competitive coexistence in transportation" (Vol. I p.74) that had been reached in Canada. Section 16 of the National Transportation Act -- the present section 23 --was developed during the consideration of Bill C-321 before the Standing Committee on Transportation and Communications.

Unlike the previous "undue discrimination" provisions of the Railway Act, section 23 National Transportation Act applies to all of the modes of transport over which the Canadian Transport Commission has jurisdiction. To date, however, no section 23 case has been made concerning a mode of transport other than railway. The section states:

> (2) Where a person has reason to believe
>
> (a) that any act or omission of a carrier or of any two or more carriers, or

> (b) that the effect of any rate established by a carrier or carriers pursuant to this Act or the Railway Act after the 19th day of September 1967, may prejudicially affect the public interest in respect of tolls for, or conditions of, the carriage of traffic within, into or from Canada, such person may apply to the Commission for leave to appeal the act, ommission or rate, and the Commission shall, if it is satisfied that a prima facie case has been made, make such investigation of the act, omission or rate and the effect thereof, as in its opinion warranted.

One notes that paragraph 2(b) expressly confers jurisdiction over "traffic within, into or from Canada", thereby including international movements. The regulatory process can be broken into a number of steps. In the 1971 decision in the Prairie rapeseed crushers application for leave to appeal rates on rapeseed oil and meal, "the Rapeseed Case", the Railway Transport Committee stated:

> Section 23 indicates it should be dealt with in four stages. On the filing of an application, the Commission is to decide whether leave to appeal the act, omission or rate should be granted. Then, the Commission is to conduct such investigation of the act, omission or rate as in its opinion is warranted, and, in so doing, have regard to the matters enumerated by subsection (3). The third step requires the Commission to hold a hearing at which the applicant and other parties in interest are entitled to appear. Finally, the Commission is to decide whether the act, omission or rate in question in the appeal is prejudicial to the public interest, and, in the event of such a finding, is empowered to take remedial action in the terms of subsection (4): Order No. R-13001 (Oct. 29, 1971).

The public interest, to which the act, omission or toll must be prejudicial, is stated to include, but is not restricted to, the public interest as defined by the National Transport Policy of section 3 of the National Transportation Act. In addition to this general reference to the whole of section 3, two of its subsections appear again in section 23 as factors which the Commission must take into consideration as part of any investigation. The Act states that the Commission shall consider among other things:

> (a) Whether the tolls or conditions specified for the carriage of traffic under the rate so established are such as to create

> (i) an unfair disadvantage beyond any disadvantage that may be deemed to be inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved, or
>
> (ii) an undue obstacle to the interchange of commodities between points in Canada or an unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports: or

Item (i) directs the Commission to look beyond those differences in rates due to specific cost conditions when determining if a rate differential is prejudicial to the public interest. When equality was removed from the Railway Act, discrimination in a business sense was unavoidable. Under this section, however, the Commission is directed to investigate any alleged undue prejudice. The Act goes on to state that the Commission shall also consider the following in its investigation:

> (b) whether control by, or the interests of a carrier in, another form of transportation service, or control of a carrier by, or the interest in the carrier of, a company or person engaged in another form of transportation service may be involved.

Finally, with respect to the Commission's authority to correct any omission, act or toll it finds prejudicial to the public interest, the Act states:

> (4) If the Commission, after a hearing, finds that the act, omission or rate in respect of which the appeal is made is prejudicial to the public interest, the Commission may, notwithstanding the fixing of any rate pursuant to section 278 of the Railway Act but having regard to sections 276 and 277 of that Act, make an order requiring the carrier to remove the prejudicial feature in the relevant tolls or conditions specified for the carriage of traffic or such other order as in the circumstances it may consider proper, or it may report thereon to the Governor in Council for any action that is considered appropriate.

In summary, section 23 of the National Transportation Act provides a general route of appeal over and above the specific rate control provisions of the Railway Act or the Transport Act. Under this general public interest provision, the Commission must first satisfy itself that the applicant has a prima facie case, and if it does, it must then conduct an investigation of the complaint. While the legislation clearly envisages a number of steps, the CTC General Rules were amended in May of 1983 to come into effect on September 1 of that year, incorporating procedural sections pertaining to a Special Appeal pursuant to section 23: C.R.C., c. 1142 as am. SOR/83-448. The intent of the amendment to the General Rules was to expedite the four-stage process envisaged by the National Transportation Act.

II (b)(ii) Related Issues

Rebates

Certain railway movements in the United States are no longer subject to public rates. Rate transparency, to the extent to which it exists in the U.S., is no longer considered to be fully representative of the effective rate of the movement. Firstly, the ICC has jurisdiction to exempt from regulation certain commodities and types of traffic. Secondly, railway carriers have the power to negotiate transportation contracts containing rebate or allowance clauses. A corollary of this power is the ability to negotiate contracts which are potentially both rate and route specific. The Minister's terms of reference put at issue the conformity of the American practice with the Railway Act where a joint international through rate is in effect. The Railway Act, at sections 380 and 381, provides:

> 380.(1) Any person or company or any officer or agent of any company who offers, grants or gives, or solicits, accepts or receives any rebate, concession or discrimination in respect of the transportation of any traffic by the company, whereby any such traffic is, by any device whatever, transported at a less rate than that named in the tariffs then in force, is for each offence liable to a penalty not exceeding one thousand dollars.
>
> 381.(1) If the company files with the Commission any tariff, and such tariff comes into force and is not disallowed by the Commission under this Act, or if the company participates in any such tariff, any departure from the tolls in such tariff, when so in force, is, as against such company, its officers, agents or employees, an offence under this Act.

In the 1906 statute consolidation, these sections read:

> 401. Any person or company, or any officer or agent of any company, --
>
> (a) who shall offer, grant, or give, or shall solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any traffic by the company,

> whereby any such traffic shall, by any device whatsoever, be transported at a less rate than that named in the tariffs then in force; or,
>
> (b) for whom the company or any of its officers or agents shall by any such means be induced to transport traffic, and thereby to discriminate unjustly in favour of any such person, company, officer or agent as against any other person or company; or,
>
> (c) who shall aid or abet the company in any unjust discrimination;
>
> shall for each offence be liable to a penalty not exceeding one thousand dollars and not less than one hundred dollars.
>
> 402. If the company files with the Board any tariff, and such tariff comes into force and is not disallowed by the Board under this Act, or if the company participates in any such tariff, any departure from the tolls in such tariff, while so in force, shall, as against such company, its officers, agents or employees, be an offence under this Act.

Again, one notes a strong parallel between the initial Canadian legislation and the initial American legislation. The Interstate Commerce Act formerly provided:

> Sec. 10 (as am. March 2, 1889; June 18, 1910; February 28, 1920)
>
> (2) Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine cf not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two

> years, or both, in the discretion of the court, for each offence.

Further, the Interstate Commerce Act at subsection 6(7) specified *inter alia*: "nor shall any carrier refund or remit in any manner or by any devise any portion of the rates, fares and charges (specified in the tariff filed and in effect at the time)".

As noted above, by the Elkins Act of 1903 the published tariff was made the standard of lawfulness in the U.S., which in turn added significance to the Interstate Commerce Commission's power in enforcing equality of charges and open dealing. It is claimed that it was sponsored by the railroads themselves because of the great pressure for preferential treatment that was exerted upon them by powerful interests having control of large tonnages of freight.

The ability of shippers or their associations to determine market prices is inconsistent with a regulated environment which exists to correct market distortions introduced by an environment of significant monopoly or duopoly. Such an environment is accepted to have existed in Canada, particularly during the period between the creation of the Canadian National Railways in 1917 and the significant advent of motor transport technology together with the expansion of highways following the Second World War. Evidently, either through market forces or otherwise, prior to the Railway Act of 1903 and premised on the equality of tolls to all persons, contractual arrangements involving preferential rates were in existence:

> It developed during the hearing of the case that the former special rates were privately arranged between the Sydenham Glass Company and the Canadian Pacific R.W. Co.; in other words, the reduction was made to the Glass Company in the form of private rebates, with the object of securing to the Canadian Pacific R.W. Co. the entire output of the industries controlled by the complainants.
>
> ...
>
> The Canadian Pacific R.W. Co. cancelled these arrangements with the Glass Company on the ground that its proportion of the through rate, which it received when Chatham was the point of interchange, had been diminished by the shifting of the point of interchange to London and St. Thomas. A new private arrangement was then made, and the rates under this arrangement are those which the Sydenham Glass Company wish to have restored.
>
> These old private arrangements became unlawful on the passage of the new Railway Act; hence the advance in rates which is now objected to, and is the subject dealt with in the present application.

> : The Sydenham Glass Company Case (1904), 29 C.R.C. 402 at 410. *per* Board.

In several early cases the Board affirmed the proposition that a contractual basis for a rate which differed from the public rate, regardless of volume commitments or other "valuable consideration", violated the premise of rate equality. The railway companies relied on these provisions of the Act to cancel earlier, lower, contractual rates.

In Lyons Fuel & Supply Co. v. Algoma Central & Hudson Bay Ry. Co., the Board noted:

> Their plea that the greater volume of traffic they give the railway entitles them to a preferential rate is not sound in my opinion, were it otherwise, the large shipper would be advantaged to the detriment, not to say the extinction, of the smaller one in every line of trade: (1917) 23 C.R.C. 146 at 150.

In an earlier application by a shipper, seeking the reinstatement of the lower rate, the Board noted:

> As to the matter of a contractual basis of a rate, the obligation is to maintain a reasonable rate, and the Board is not precluded by the terms of any agreement, whether formal or informal, from seeing to this. The Interstate Commerce Commission has ruled on a similar point in Straw Rates from Stations in Missouri to Alton, Ill., 29 I.C.C. 263. The proposition that a favoured treatment in respect of rates could be enforced on the ground of "adequate" consideration having been given was stated not to be binding on the Board, the principle being stated to be one which had not been introduced into the railway jurisprudence of Canada. Crow's Nest Pass Coal Co. v. Canadian Pacific Ry. Co., 8 Can. Ry. Cas. 33 at pp. 40-41. It follows that adequacy of consideration is not such a justification for the continuance of a given rate basis as to oust the propriety of that rate basis being made reasonable, no matter by whom such application is made.
>
> : (1916) 22 C.R.C. 361 at 367

The decision of the Board cited in the above quotation quite clearly links those sections of the Act prohibiting rebates and other departures from the public rates with the Board's jurisdiction to enforce equality:

> The Railway Act requires that under substantially similar conditions the tolls charged shall be equal to all persons, and at the same rate, whether by weight, mileage, or otherwise, and any reduction or advance either directly or indirectly is expressly prohibited. No undue or unreasonable preference or advantage can be permitted to any person or company. The object of the legislation is to place every one upon terms of absolute equality, and if agreements were permitted to be entered into for reduction in tolls or for other preferential treatment, the door would be opened wide for the defeat of the Act, and the Board would be called upon to struggle with all sorts of conditions, opinions, and complications in the determination of such cases.
>
> : (1908) 8 C.R.C. 33 at 41.

One notes that, in the course of amendments and consolidation of the Act, the margin note to the section prohibiting rebates changed from "unjust discrimination" to "unlawful rebates or concession".

Limitation of Liability

With respect to the limitation of liability, the Railway Act provides:

> 294. (1) No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice has been first authorized or approved by order or regulation of the Commission.
>
> (2) The Commission may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.
>
> (3) The Commission may be regulation prescribe the terms and conditions under which any traffic may be carried by the company.

The above noted section of the Railway Act, section 294, is unchanged from the section governing a railway company's ability to limit its liability in respect of the carriage of any traffic as found in the Act of 1906. In 1915, the then section 340 was the subject of an appeal to the Judicial Committee of the Privy Council, in which Viscount Haldane L.C. noted:

> Before adverting to the facts out of which the litigation arose, it will be convenient to refer to certain provisions of the Railway Act of Canada. Apart from statute, a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. The freedom so to stipulate has been restricted in Canada by the Railway Act (ch. 37 R.S.C.). Under section 340 no contract restricting liability for carriage is to be valid unless it is of a kind approved by the Railway Board, which is empowered to determine the extent to which such liability may be impaired, restricted, or limited, and generally to prescribe by regulation the terms and conditions under which any traffic may be carried. Standard and special freight tariffs are to be filed with the Board and to be subject to its approval, and are to be published, and made open to the inspection of the public at the railway companies' stations and offices. Under the Act the companies are, by section 284, put under a general obligation to carry and deliver with due care and diligence, and anyone aggrieved by a breach of this duty is to have a right of action, from which the companies are not to be relieved by any notice, condition, or declaration if the damage arises from negligence or omission. It is, however, to be observed that this right is expressed by the section to be given "subject to this Act". Their Lordships think that where, under section 340 and the other sections which deal with special tariffs, forms of stipulation limiting liability have been approved by the Board, and the conditions for making them binding have been duly complied with, the companies are enabled in such cases to contract for complete freedom from liability for negligence.
>
> : Grand Trunk Ry. Co. v. Robinson, (1915) A.C. 740, 22 D.L.R. 1, (1916) 19 C.R.C. 37 at 38.

Another railway company later appealed this section to the Privy Council, and the proposition in the Robinson case was again affirmed: Canadian Pacific Ry. Co. v. Parent (1917) A.C. 195; 33 D.L.R. 12; 20 C.R.C. 141. Both of these cases involved what was known as a "Livestock Special Contract" and, accordingly, the liability at issue arose under the terms of a contract relieving the appellant railway of liability for injury or death, even where caused by negligence, to a person travelling in charge of livestock being carried by the railway. The factual situations did not require their Lordships to direct their minds specifically to the interrelationship of limitations of liability and the effective rate for the railway movement.

Exchange of Information

The issue of the extra-territorial reach of the American anti-trust laws, and the possible effect thereof on the operations of those railway companies incorporated in Canada, and their American subsidiaries, both in Canada and in the United States, was noted throughout all the phases of the Commission investigation.

The relevant section of the Railway Act, which permits the railroads under the jurisdiction of parliament to act in a manner which may be termed "collective", is section 279:

> Railway companies shall exchange such information with respect to costs as may be required under this Act and may agree upon and charge common rates under and in accordance with regulations or orders made by the Commission.

In sum, section 279 contains a mandatory provision concerning the railway companies' exchange of cost information and a permissive provision allowing railway companies subject to the Railway Act to agree upon and charge common rates. The section was added to the Railway Act as a consequential provision of the enactment of the initial National Transportation Act, S.C. 1966-67, c. 69, s. 53. (The present section 279 was then numbered section 337.) Another related consequential provision of the initial National Transportation Act was the repeal of the Canadian National - Canadian Pacific Act: NTA S.C. 1966-67, c. 69, s. 76. The Canadian National - Canadian Pacific Act, S.C. 1932-33, c. 33 was passed during the Depression, presumably with the intent of rationalizing the operation of the two railways in lean economic times. Such rationalization would have necessarily involved cooperation between the railways. Accordingly, the present section 279 of the Railway Act represents the residue of the legislative intent underlying the Canadian National - Canadian Pacific Act.

For this report, the central provision of the latter Act, styled, "An Act respecting the Canadian National Railways and to provide for cooperation with the Canadian Pacific Railway system,..." is section 16:

> 16.(1) The National Company, for and on behalf of itself and/or any or all other of the companies and other elements of which National Railways as defined by this Act is composed, and the Pacific Company, for and on behalf of itself and/or any or all other of the companies and other elements of which Pacific Railways as defined by this Act is composed, are, for the purposes of effecting economies and providing for more remunerative operation, directed to attempt forthwith to agree and continuously to endeavour to agree, and they respectively are, for and on behalf as aforesaid, authorized to agree,

> upon such cooperative measures, plans and arrangements as are fair and reasonable and best adapted (with due regard to equitable distribution of burden and advantage as between them) to effect such purposes. They are further directed that whenever they shall so agree they shall endeavour to provide through negotiations with the representatives of the employees affected, as part of such measure, plan or arrangement or otherwise, for a fair and reasonable apportionment as between the employees of National Railways and Pacific Railways, respectively, of such employment as may be incident to the operation of such measure, plan or arrangement.

...

Any schemes under this Act, "for the purposes of effecting economies and providing for remunerative operation" required the approval of the Board but were, however, beyond the power of the Board to initiate or to enforce. Moreover, the Board had no duty or authority to require proof, before granting a general percentage increase in rates, that all possible economies had been effected by any such cooperative measures or arrangements between the C.N.R. and C.P.R.: Re General Increase in Freight Rates, 1948, (1950) 64 C.R.T.C. 139 at 149 per Wardrope A.C.C. affirming (1948) 62 C.R.T.C. 1 at 64.

Finally, the cooperative measures of this Special Act, no doubt predicated by the special circumstances of the Depression, were inconsistent with a fundamental provision of the Railway Act:

> No company shall, without leave therefor having been obtained from the Board, except in accordance with the provisions of this Act, directly or indirectly, pool its freights or tolls with the freights or tolls of any other railway company or common carrier, or divide its earnings or any portion thereof with any other railway company or common carrier, or enter into any contract, arrangement, agreement, or combination to effect, or which may effect, any such result.
>
> : R.S.C. 1906, c. 37, s. 316; R.S.C. 1927, c. 170, s. 315; R.S.C. 1952, c. 234, s. 318.

This provision followed immediately after the section which stated that under substantially similar circumstances, "all such tolls shall always...be charged equally to all such persons...". Coyne notes that,

> Two methods of pooling are intended to be prohibited: First, a physical pool, which means a distribution by the

> carriers of freight or passengers offered for transportation ... Secondly, a money pool -- in the language of the Act, to 'divide its earnings or any portion thereof, with any other railway company'.
>
> : The Railway Law of Canada (1947) at 455.

One notes that the specific provision of the Special Act and this general section of the Railway Act were in force, contemporaneously, from 1932 to 1967. One also notes that both the prohibition on pooling and the legislative intent of the C.N. - C.P. Act had a corresponding section in the Interstate Commerce Act:

> Sec. 5. (as am. Aug. 24, 1912; Feb. 28, 1920; and June 10, 1921)
>
> (1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this Act, it shall be unlawful for any common carrier subject to this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different competing railroads, or to divide between them the agregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: Provided, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to be all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and, upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

Clearly, this section prohibiting collective behaviour had to be considered in conjunction with the provisions of the Sherman Act. In 1945, the American Supreme Court reaffirmed, in a suit brought against a railway company, that regulated industries were not exempt from the anti-trust laws: (1945) 324 U.S. 443. Congress, in turn, enacted the Reed-Bulwinkle Act of 1948, amending the Interstate Commerce Act. The Act granted immunity from anti-trust laws to carriers that used rate bureaux approved by the ICC. This exemption was later narrowed by the Staggers Rail Act of 1980: c.f. 49, U.S.C. 10706(a)(3)(A)(ii).

It is hoped that this historical background demonstrating the evolution of the present legal framework regarding international railway traffic will be useful in appreciating not only the current situation in Canada but also the efforts in both countries to maintain virtually compatible regulatory régimes. This background discussion should contribute to a better understanding of the recommendations found in Chapter 6 of the Report.

APPENDIX D

SUMMARIES OF EVIDENCE

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SUMMARIES OF EVIDENCE

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D.1 CN Rail

D.1.1 General

CN Rail made submissions to the S.81 Inquiry, presented written and oral evidence to the public hearing, and made final argument in Ottawa. Messrs. J.W. Ongman, J.H.D. Sturgess and M.J. Barron appeared as witnesses for CN Rail in Montreal, while Mr. Ongman and Mr. J.M. Provost presented evidence on the company's behalf in Calgary and Vancouver. Mr. Ongman, an attorney in the U.S. specializing in, among other things, rail regulatory law, gave evidence concerning the evolution and present effect of U.S. Rail regulation and legislation. Mr. Sturgess and Mr. Provost were primarily concerned with the operations of CN Rail itself, being senior officials of that company. Mr. Barron, Assistant Vice-President of Marketing for Grand Trunk Western Railroad, a CN Rail subsidiary operating in the U.S., gave testimony concerning that company's changing experiences in the post-*Staggers* environment.

D.1.2 Potential Scope of Staggers Impact

Mr. Sturgess, CN Rail's Vice-President of Marketing, testified that about 25 percent of CN Rail's revenue ($700-$800 million annually) came from international traffic. This revenue was generated from movements occurring partly on territory within U.S. jurisdiction and partly on territory within Canadian jurisdiction. Differences in regulation between the two jurisdictions governing these movements could impact CN Rail revenues directly, or indirectly through affecting the revenues of U.S. connections/subsidiaries. As well, utilization of CN Rail-owned equipment could be affected, with impacts on CN Rail profitability. Traditionally, the originating carrier supplied equipment used in a shipment and expected adequate revenues from long-haul carriage to compensate for this ownership cost. New marketing practices are allowed or required by U.S. deregulation, according to CN witnesses, and these may affect Canadian as well as U.S. operations.

Mr. Ongman outlined the changes in U.S. law resulting from *Staggers*. He emphasized that U.S. law now stresses intramodal competition. The law promotes new marketing practices by allowing customers to make volume commitments with specific railways through confidential contracts, allowing route-specific pricing by railways, encouraging railway discrimination between customers on specific services, and encouraging price-discrimination generally. As well, cancellation and surcharging of routes is more prevalent since *Staggers*. Mr. Ongman noted that exposure to U.S. anti-trust laws was greatly increased by Staggers, requiring changes in methods for negotiating general rate increases (due to inflation or other causes). As well, statutory requirements for privacy of rail contract information in the U.S. as well as Interstate Commerce Commission (ICC) decisions to exempt certain traffic from economic regulation entirely (including tariff publication regulations) resulted in a loss of certain market information previously available.

D.1.3 Evidence of Staggers Effects

CN Rail introduced a variety of evidence to illustrate their contention that Staggers had affected their operations and revenues and those of their customers. Consequently, CN Rail recommended changes in Canadian law and regulation so that international rail commerce could continue on a basis that was both effective and fair to all concerned.

Direct Effects on CN Revenues

Claims by CN Rail of changes in revenues and operations resulting from U.S. deregulation included:

- CN Rail revenue decrease of $3.8 million on 90,000 tons of wood-pulp moved in 1983, the decrease being attributed to short-hauling (diversion from a CN Rail long haul route to a route where CN Rail's haul is much shorter).
- CN Rail revenue decrease of $6.8 million on 120,000 tons of lumber moved in 1983 (decrease attributed to short-hauling)
- CN Rail decrease in earnings of $0.55 million on 110,000 tons of wood-pulp moved in 1983, due to re-negotiations of divisions required to retain CN rail long-haul.
- CN Rail revenue decrease of $0.81 million on 7,700 carloads of Printing Paper traffic moved overhead (U.S.-U.S. via Canada) in 1983, the decrease being attributed to divisions adjustments required to retain traffic.
- CN Rail revenue losses of $25 million due to reduced market share in Alberta Sulphur traffic between the third quarter of 1981 and September, 1984 (market share reductions being attributed to confidential contracting by U.S. carriers).
- CN Rail revenue decrease of $5 million (projected) on undisclosed tonnage of Sulphur moved and to-be-moved in 1984, attributed to price-competition between CN Rail and CP Rail resulting from reduced anti-trust immunity in the U.S.
- CN Rail revenue increases of $0.90 million on sulphur traffic of 360,000 tons moved in 1983 by CN's long-haul route following a route cancellation by CN Rail.

CN witnesses stated that these were specific examples indicating the type of harm suffered by CN Rail and were not exhaustive. CN Rail introduced into evidence a letter which had been sent to the Minister of Transport, stating that CN Rail and CP Rail had, between them, experienced losses of expected revenues totalling over $100 million as a consequence of U.S. deregulation. CN Rail witnesses were unable, however, to specify what part of this joint figure was CN Rail's and what part was CP Rail's. Nor did CN Rail file evidence which would permit a detailed examination of the basis for the $100 million figure. CN witnesses did state that part of the revenues lost by CN Rail was gained by CP Rail when traffic which had previously moved by CN routes moved by CP to U.S. gateways. Losses of CN and CP, calculated by the same methods and added together, would therefore overestimate total losses to the two companies from similar causes.

The total loss of anticipated revenues by both railways of $100 million would equal about one percent of CN Rail's revenues during the period in question. (CN witness Mr. Sturgess estimated company freight revenues at between $2.8 and $3.2 billion annually.)

Methods of calculating losses were explained by witnesses. For instance, in some examples traffic was claimed to have moved by a gateway unfavourable to CN, where this had not previously occurred, as a result of U.S. railway practices now permitted by Staggers. In this situation, CN calculated the "Loss" as the difference between revenue CN actually received and the revenue it would have received had traffic moved by its preferred gateway.

Mr. G.E. Bennett of the Council of Forest Industries of British Columbia (COFI) questioned whether CN's lumber example accurately represented a real loss. CN had used the difference in revenues, which would accrue to them if traffic moved at the through rail rate by CN's long-haul gateway rather than their short-haul one, in calculating losses. In suggesting that the appropriate rate comparison was not made, Mr. Bennett proposed for example that a combination of rates to CN reload centres and proportional rates beyond would cost between $1,500 and $1,800 less per car for lumber destined to Palmer, Massachusetts, than the through rate used by CN in its calculations. Palmer is located in the North-eastern states affected by Conrail route closures. Mr. Bennett suggested that traffic which would potentially move by CN's eastern gateways at the through rate was in fact moved by the combination rates which were lower or by rates based on rail to reload centres and truck beyond. To calculate losses in the manner of CN was therefore inaccurate as the rate used for comparison was never applied on traffic moving through CN eastern gateways, and would not be used had Conrail not cancelled the routes in question. Mr. Provost pointed out, however, that the specific destination chosen by Mr. Bennett in his calculations (Palmer) was local to the Central Vermont Railway -- a CN Rail subsidiary. In the absence of specific rates to other points, Mr. Provost would not comment on whether such traffic might move by the through rate or combination rates to those points.

CN calculated sulphur traffic losses on a market-share basis in an effort to eliminate effects attributable to the recession by using an independent source, the Green Markets Report. Prior to Staggers, CN Rail had maintained a certain percentage of the market; had they maintained the same percentage, they would have moved a calculable tonnage which could be compared to the tonnage they actually moved. Loss of sulphur revenue was calculated by applying CN's rate to the difference in tonnage actually moved and the tonnage which would have been CN's had the market share been maintained. It was noted under questioning that, if CN had calculated its losses based on a decline in tonnage rather than on the market share basis actually used, the loss would have appeared more severe.

No evidence was adduced that service levels had declined as a result of decreased revenues from sulphur traffic attributed to competition resulting from exposure to U.S. anti-trust laws. That is, no evidence of destructive competition was adduced.

In a slightly different context, however, Mr. Sturgess noted that the effects of exposure to U.S. anti-trust laws might not appear immediately. When asked how not talking to CP on joint through rates for nine months had worked, he noted "It is all together too early to analyze...The changes normally take some years to digest".

Although criminal proceedings are possible under U.S. Anti-Trust Laws, Mr. Ongman noted that the major problem for railways as a result of potential U.S. anti-trust actions could be private civil actions for treble damages.

Effects on Canadian Shippers

CN Rail had a search conducted of Interstate Commerce Commission records which uncovered 354 filed U.S. contracts disclosing Canadian Origins or Destinations. Of these, 330 or 93% had provisions for rebates or allowances which, in CN's submission, expressly undercut the established tariff rate. CN Rail subsidiaries and the CP Rail affiliate, the Soo Line, were among 16 railways noted as having contracts, particularly rebate contracts, applying on this traffic. Tables reproduced below from CN submissions show railways filing contracts as well the commodities on which these contracts applied.

Table 1

BREAKDOWN BY RAILROAD OF CONTRACTS UNCOVERED BY CN RAIL

	No. of Contracts	No. W/ Allowances	% of Contracts W/ Allowances
Burlington & Northern	30	18	60.0
Chicago & Northwestern	91	91	100.0
Soo Line	88	86	97.7
Milwaukee	67	64	95.5
Grand Trunk Western	2	2	100.0
Arkansas & Louisiana Mo.	1	1	100.0
Baltimore & Ohio	1	0	0.0
Boston & Maine	17	17	100.0
Chesapeake & Ohio	6	4	66.7
Delaware & Hudson	8	7	87.5
Detroit & Mackinac	1	1	100.0
Detroit, Toledo & Ironton	3	3	100.0
McCloud River	1	1	100.0
Minneapolis, Northfield So.	5	5	100.0
Southern Pacific	32	30	93.8
Union Pacific	1	0	0.0
	354	330	

Source: Exhibit CN-1, Appendix "E".

Table 2

BREAKDOWN BY COMMODITY OF CONTRACTS UNCOVERED BY CN RAIL

	No. of Contracts	No. W/ Allowances	% of Contracts W/ Allowances
Woodpulp	14	13	92.9
Lumber	276	260	94.2
Paper	43	41	95.3
Other Wood Products	7	6	85.7
Grain	4	3	75.0
Other	10	7	70.0
	354	330	

Source: Exhibit CN1, Appendix "E".

CN brought this information to the attention of The Hon. Reese H. Taylor, Jr., Chairman of the Interstate Commerce Commission, with a request that the I.C.C. verify it and, if possible, provide estimates of traffic moving under the listed contracts. Mr. Taylor replied, in part:

> We reviewed a random sample of the contracts listed ... In the sample, all of the traffic involves Canadian shippers. However, we also discovered that, although these contracts have been filed with the Commission, we cannot estimate the total volume of rail traffic moving under them between the United States and Canada. The reason for this is that the contracts either: (a) contain no annual volume requirement, or (b) have annual volume requirements based on a percentage of an unknown number (e.g., 90 percent of all traffic arriving at a specific point or 70 percent of a certain commodity shipped).
>
> Because the contracts on file with the Commission do not, for the most part, indicate the tonnage volume and because they are filed by railroad and not by origin and destination, we cannot estimate the overall volume of Canadian/American traffic moving under contract rates.

CN also submitted that a further 355 contracts filed with the Interstate Commerce Commission might apply on Canadian traffic: 197 of these, including 146 with allowance provisions, were for vague or undisclosed origins and destinations, while 158, including 73 with allowance provisions, were for international gateways or major connector points between the two countries.

CN argued that not having rates disclosed to competing shippers was the selling point for Canadian lumber shippers entering into contracts with Burlington Northern for truck-train service to eastern U.S. destinations. CN also noted that CN's actions to preserve traffic by reducing rates were slow due to the need to seek concurrences from connections, giving U.S. competitors the decided edge. As well, when new rates were established, they were required to be published, setting a new target for competition.

Effects on CN U.S. Subsidiaries

Mr. Barron testified that one of the effects of Staggers was to expose the railways in the U.S. to the anti-trust laws which prevented rail carriers from meeting in rate bureaux to set prices in most matters. Rates on exempt traffic are not published in tariffs and can change daily. Use of confidential contracts, surcharges, limited liability rates, cancellation of routes and other practices now permitted by Staggers have been intensified by the mega merger movement in the U.S., he said.

Mr. Barron indicated that on some transborder movements involving CN Rail, since CN Rail could not enter into confidential U.S. rebate contracts, GTW would do so to retain such traffic. On some of these movements, however, GTW revenues were not large enough to provide profitable transportation services. In these conditions, GTW would appeal to CN Rail for an adjustment or take themselves out of the traffic.

GTW has been subjected to route cancellations by CSX and NS as well as Conrail. In the U.S., GTW is presently involved in a major lawsuit with Conrail over this practice. Mr. Barron noted that GTW, as a carrier with approximately 90% of its business joint with other rail carriers, could not from a practical point of view afford route cancellations.

In addition, increased reciprocal switching rates, from $96.66 to $296/car for example, also have been used to cut competing carriers out of traffic which they had formerly served.

Mr. Barron was also questioned as to a marketing agreement entered into between GTW and Burlington Northern, an agreement to which Mr. Sturgess stated CN Rail was not a signatory. The agreement, in part, involves solicitation of preferred routes with the expectation that it would have an effect on transborder movements. In attempts to influence traffic routings to involve preferred partners according to the agreement, GTW could go to the traffic source "as it is appropriate," said Mr. Barron. CN Rail would "Take reasonable action to cooperate ... in making the agreement work", according to Mr. Sturgess, but despite the agreement, he had "no reason to believe" that difficulties experienced by CN Rail with BN would not continue to exist. The agreement is for a ten year term.

D.1.4 Legal Issues and Argument

Antitrust Immunity

CN Rail argued that in the early days of Canadian railroading, the predatory pricing activities of Canadian roads left most of the rail system in Canada in bankruptcy. As well, the nature and distribution of the Canadian railway system mitigated against unbridled competition. In light of these facts, the Canadian government had legislated in favour of a policy of inter-modal rather than intra-modal competition. CN also referred to a report filed by Professor Trevor Heaver of the University of British Columbia in connection with the Ministry's current investigation into section 279 of the Railway Act which also recommended the retention of collective pricing. CN proposed that to maintain collective pricing on international traffic to U.S. border points, CN and CP must acquire immunity from the "extra-territorial reach" of U.S. anti-trust laws.

CN Rail argued that it was consistent with retention of collective pricing in Canada that Canadian railways be privy to each other's contracts, should confidential contracting be permitted in Canada. CN's recommendation that the Canadian railways be permitted to see each other's contracts would, however, be dependent upon the ICC's approval of the CN/CP section 10706 agreement by the ICC.

According to this agreement, the Canadian carriers would be treated as one integrated enterprise for purposes of rate discussions in the U.S. In CN's view, approval of this agreement has been made especially necessary by changes in U.S. law which became effective January 1, 1984. As of that date, U.S. law required that broad tariff changes and general rate increases could be agreed on and discussed only by direct connector railways. That is, those engaged in different segments of a continuous movement of goods. Consequently, U.S. railways could no longer engage in negotiations on through routes jointly with the Canadian carriers as they had previously, under a narrower grant of immunity made by the Interstate Commerce Commission in 1982.

CN Rail again endorsed the proposal made jointly with CP Rail in a letter to the Minister of Transport dated June 18, 1984, that the Canadian Government should reaffirm its concern with the extraterritorial reach of U.S. anti-trust laws to encourage the ICC to rule that Canadian carriers could deal jointly with U.S. carriers despite the coming into force of the new U.S. law.

Legality of Contract Rates

CN stated that its position on this matter was set out in a letter jointly sent with CP Rail to John Magee, Chairman of the Railway Transport Committee dated 22 July, 1982. In that letter, CN Rail maintained that as a result of confidential contacts, some Canadian shippers were benefitting from a rebate in freight charges which was not authorized by Canadian law. The publication and filing provisions of the Railway Act were enacted to ensure that public notice was given of freight rates in this country, to prevent unjust discrimination and to make all rates known to all shippers, said CN. Any procedures which circumvent these provisions are patently wrong, contravene the Railway Act, and are prejudicial to the best interests of rail transportation in this country, CN concluded.

CN Rail also argued that when Canadian railways are short-hauled on international traffic as a result of U.S. contracts, the major beneficiary is the U.S. carrier. As contracts may be signed with the U.S. consignee, the consignee could also benefit, thereby transferring financial benefits from the Canadian railways directly to the U.S. railway and the U.S. consignee.

Accordingly, CN argued that changes in Canadian law respecting international traffic which would render it legal for Canadian carriers and shippers to enter into contracts with confidential rate provisions are necessary. Such contracts would allow Canadian shippers to compete with their U.S. and Canadian counterparts as to transportation costs, and equalize the competitive positions of Canadian and U.S. carriers. Restriction of such contracts to international traffic and permitting Canadian railways access to the contracts signed by other Canadian railways and shippers would, according to CN Rail, allow Canadian railways and shippers the opportunity to compete with their American counterparts while preserving as much of Canadian transportation policy as possible.

Under questioning, CN witness Mr. Provost noted that there could be a considerable spread in rates offered shippers with confidential contracts, were these allowed. He further noted that CN had not committed to do anything really as a result of their proposals. Rather, CN wanted an ability to contract if necessary. Mr. Provost noted that confidential contracts could be a tool to stabilize a share of a particular market while, at the same time, maximizing CN's long-haul.

According to Mr. Provost, shippers would likely choose confidential contracts if they had a choice between entering into a contract where the rate was transparent, and all of the other conditions were transparent, as opposed to entering into a confidential contract.

Exemption of "Bridge" Traffic from Economic Regulation

CN Rail, in its June 18, 1984, letter to the Minister of Transport, recommended that section 287 of the Railway Act be amended so that the CTC no longer would have jurisdiction on an overhead (bridge) movement from a U.S. point to a U.S. point through Canada.

Mr. Ongman noted that according to U.S. law, movement from Canada through the U.S. and back into Canada would not be subject to ICC jurisdiction. That is, the U.S. does not attempt to exert jurisdiction in what would be a reciprocal situation.

As well, CN noted that bridge traffic is essentially a U.S. movement, and that no shipper or shipper group had objected to the aforementioned recommendation to the Minister. CN indicated in argument that if predatory pricing were to result on bridge traffic, such action could come under the purview of the U.S. commerce laws.

Discovery Problems

Mr. Ongman indicated that the ICC is presently considering comments on interim discovery rules issued on July 11, 1984. The interim rules provide, however, that the inspection of actual contract terms will only be granted if a petitioner has standing to file a complaint, is affected by the contract, and has a demonstrated need for access to additional contract information to perfect a complaint under 49 U.S.C. section 10713(d).

That section allows only individual shippers and individual ports to file a complaint against contracts which may harm the particular complainant and then only in certain restricted circumstances. Railways would not have standing to challenge another railway's contracts and so would be unable to discover the terms of those contracts. In particular, Canadian railways would be unable to discover the terms of U.S. railways' contracts.

Section 11910 of 49 USC dealing with unlawful disclosure of information was brought to the panel's attention by CN. That section provides for fines up to $1,000 for disclosing information on shipments without the shipper's permission where that information may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee.

CN noted that these legal restrictions made it awkward or impossible for CN to gain information which would allow it to meet competition or information which would demonstrate that other railways' contracts were the certain cause of particular CN problems. As well, CN argued that in providing certain information to the panel regarding identifiable movements by shippers using CN services, CN could be liable to fines under U.S. law.

Limitation of Liability

The chief measures allowing limitation of liability under Staggers are contained in 49 USC Section 10730, according to Mr. Ongman. That section provides that a railway may file tariffs with the ICC limiting its liability, provided shipper and carrier agree, prior permission of the ICC not being required. Liability may also be limited by contract. The ICC may, however, require carriers to continue to publish full liability rates for non-exempt commodities in addition to whatever limited liability rates may be available.

CN argued that in situations where shippers in the U.S. are precluded contractually from suing U.S. carriers, they can still sue the Canadian carrier for the full amount of damages. The Canadian carrier is unable to divide the liability proportionately because the cause of the damages is not known. Thus far in Canada, Canadian carriers have been denying liability in such circumstances, but the amounts of the outstandings are growing daily, and litigation may soon result.

Route Cancellations

CN argued that Canadian railways should be given the authority to cancel routes on joint international traffic. Under current legislation, an application under section 23 National Transportation Act could be made against such action. But, CN argued, the threat of route cancellation, if it were permissible under Canadian law, would deter U.S. roads from exercising their rights under U.S. law to CN's disadvantage. Apparently, U.S. carriers under Staggers have been granted wide latitude in this regard.

In argument, CN stated that route cancellations would only be used defensively, that is, the Canadian railways are seeking the right to cancel routes in response to U.S. carrier action.

Mr. Sturgess had earlier submitted that Canadian carriers must have this same (as U.S. carriers) ability on international shipments to counter the negative effect of U.S. carrier action. This would not be a right to be used indiscriminately but only to offset U.S. carrier action.

Mr. Ongman testified that CN had joined in an early case in the U.S. against route cancellations by Conrail. Evidence was submitted there by the Canadian railways that they were likely to lose $8 million annually as a result of such joint rate cancellations. The ICC ruled in favour of Conrail by not reinstituting the application of certain joint rates. However, this matter was appealed to the U.S. Court of Appeals which remanded the case to the ICC for rehearing. The case was remanded due to certain essential evidentiary deficiencies but the court approved the decisional criteria employed by the ICC.

Nevertheless, the courts did not order the ICC to reinstitute the application of the joint rates to the affected through rates pending the completion of its rehearing and the application of these joint rates to the affected through routes remains cancelled.

Route Surcharging

CN pointed to a recent case involving the D & H railway as an example of a disruptive situation where they had been disadvantaged by not being able to apply surcharges. D & H had flagged out of an increase on certain joint routes, "making its freight charges via its gateway 3.5% less to and from the same points as other carriers participating in this market". This threatened to divert traffic away from CN longhaul gateways and a surcharge was applied from CN origin stations on routes involving D & H. Pursuant to section 45, NTA, an application was filed. The RTC ruled that the new tariff incorporating higher rates had not been agreed to by D & H and therefore, the D & H had not agreed to the filing of a 'joint tariff' and the old tariff remained in effect so far as D & H was concerned. That decision is currently under review.

Application of Section 23 NTA on International Traffic

CN argued that in respect of international traffic, in order to allow Canadian railways to compete on an equal basis with U.S. roads, an exemption from the application of section 23 of the National Transportation Act was also necessary.

According to CN, U.S. law permits quarterly increases for inflation at a calculated rate "without any regulatory intervention whatsoever", and permits appeal of other published rates only when market dominance is shown. Even where this has been done, "it would be the rare case where a shipper could show the rate to be above a maximum reasonable level".

Appeals against contract rates are narrowly limited in the U.S. For commodities other than agricultural commodities (which includes forest products and paper), individual shippers and ports may appeal a contract rate only if they will be individually harmed by a contract. In the case of agricultural commodities, appeal is allowed only if a shipper is not offered a similar contract under similar conditions when the shipper is ready, willing and able to enter into such a contract or when destructive competition would result from the contract.

CN adverted to a need to restrict section 23 appeals in the case of cancellations of routes for international traffic by Canadian carriers. For instance, in the Emerson Route Cancellation complaint, CN argued that, had the Emerson route been re-instated pending resolution of a section 23 case, they would have lost the traffic completely.

Rate Relationships

CN witnesses stated on a number of occasions that traditional rate relationships had disappeared, were rapidly being eroded or were impossible to determine.

Possible anti-trust action which could result from discussions between carriers, according to Mr. Sturgess, makes it very difficult to maintain rate parity on international rates since carriers are unable to discuss rates.

Mr. Provost stated that, to his knowledge, a situation now exists on international traffic where customers having confidential contracts receive differentiated rates. He indicated that this situation effectively produces an unknown differentiation between the published rate and the effective charges, resulting from secret rebate contracts.

Presently, U.S. law permits certain traffic to be exempted from economic regulation. While railways may distribute price lists, the rates are within the discretion of the carrier. The carriers are not required to publish tariffs or file them with the ICC. There is then no basis for proper comparison of rates between sets of origins and destinations for such traffic. In particular, CN noted that boxcar traffic in the U.S. is exempted from regulation. When this exemption came into effect, tariffs specifying boxcar rates were cancelled, and in particular tariffs of rates on woodpulp moving in boxcars were cancelled. Woodpulp moves almost exclusively in boxcars, and while a tariff of rates for woodpulp movements originating in Canada has been filed with the CTC (not the ICC), according to CN, "Rates from U.S. origins remain cancelled". The ICC decision to exempt boxcar traffic from regulation has been vacated in part, but as yet filing of boxcar tariffs on traffic moving from U.S. origins has not been reinstated and it is not certain that it eventually will be. In the meantime, there is no filed tariff to serve as a basis of rate comparison for U.S. and Canadian traffic moving to the same destinations in boxcars and in particular no basis of comparison for such woodpulp traffic.

In argument, CN noted that a number of shippers openly conceded that rate relationships had become impossible to maintain.

D.1.5 Other Issues Raised

Captive Shippers

CN stated that some parties had raised the possibility that captive shippers would suffer grave injury if Canadian carriers could enter into confidential contracts. CN argued that Canadian shippers are already entering into U.S. confidential contracts and it had not been established that Canadian shippers suffer from captivity in any event.

Need for Changes in Canadian Law on Domestic and Offshore (Export) Traffic

CN argued that the situation regarding international traffic was much different than that of other traffic and that no move should be made to change existing law except as to its application on international traffic, at least until a full investigation of that question is carried out.

In differentiating the two types of traffic, CN emphasized that on international traffic, "The cost of rail transportation makes up the greater portion of costs associated with the movement of goods handled between the two countries, (but) the rail portion of the total cost of moving import/export traffic to and from Canada is a relatively small part of the total cost of transportation to and from overseas countries".

D.1.6 Recommendations

In argument, CN submitted that:

a) "The CTC should act immediately to rescind Discount Tariff 9015."

CN further recommended endorsement by the panel of those points raised in the railways' letter to the then Minister of Transport dated June 18, 1984, those being:

a) Canadian railway legislation should be modified to allow confidential contracts to be negotiated by

Canadian railways for international traffic. These contracts should be filed with the CTC and be accessible to other Canadian rail carriers.

b) Section 287 of the Railway Act should be amended so that the CTC no longer has jurisdiction on an overhead (bridge) movement from a U.S. point to a U.S. point through Canada.

c) Canadian railways should be given the authority to cancel routes and surcharge on joint international traffic.

d) General Orders T-5 and T-6 should be amended so that Canadian railways have the ability to negotiate liability conditions on international traffic, on a basis similar to their American counterparts.

e) The Canadian Government should reaffirm its concern with the extra-territorial reach of the U.S. anti-trust laws.

D.2 CP Rail

D.2..1 General

CP Rail made submissions to the S. 81 Inquiry, presented written and oral evidence to the public hearing, and made the final argument in Ottawa. In addition, CP Rail supplied, on a confidential basis and after the hearing, estimates by commodity type of revenue losses said to be due to the impact of the deregulation of U.S. rail traffic.

Mr. R.J. Ritchie, Vice-President of Marketing and Sales for CP Rail, Mr. L.M. Allen, General Manager, Marketing and Sales, CP Rail, Mr. J.J. Côté, Directeur général, Commercialisation et ventes, CP Rail, Mr. E.V. Dodge, Assistant Vice-President Marketing, CP Rail, and Mr. Richard Flynn, a U.S. attorney appeared as witnesses for the company in Montreal. Mr. Dodge and Mr. D.A. Behnish, CP Rail's Director, Marketing Forest Products, appeared as witnesses for the company in Vancouver.

Mr. Ritchie testified mainly on the system effects of Staggers, and the strategic difficulties experienced by CP Rail as a result of Staggers. Mr. Côté testified particularly about effects on pulp and paper traffic, including regional variations in impact of this traffic and effects on it resulting from Staggers. Mr. Allen was particularly concerned with CP Rail's Potash traffic, while Mr. Dodge and Mr. Behnish concentrated especially on forest products and in particular on lumber. Mr. Dodge had held the position of General Manager for Coal and Lumber for CP Rail, and had been located in Vancouver, before taking up his current position. Mr. Flynn mainly provided advice to Mr. Ritchie on points of U.S. law.

D.2.2 Potential Scope of Staggers Impact

CP Rail noted five major areas of difference between Canadian and U.S. laws that affected CP's ability to compete effectively on transborder and overhead traffic. Mr. Côté testified that this traffic represented about 22% of the total traffic volume and 22% of revenues for the company.

The importance of this traffic for the pulp and paper sector of CP Rail's operations was even greater, according to Mr. Côté. Sixty-two per cent of pulp and paper cars handled and 66% of CP Rail revenues generated by pulp and paper traffic resulted from international or overhead movements. CP Rail has a fleet of about 5,300 cars (of $358 million replacement value) for serving the pulp and paper traffic. Some 2,300 of these are specially designed, expensive cars especially suited to the newsprint industry.

Mr. Côté noted that nearly 38% of CP Rail's Atlantic territory traffic revenues were generated by international and overhead traffic and particular segments of CP Rail's network in this region depend very heavily on this type of traffic. Certain other areas such as the Temiscamingue and Lachute Subdivisions attribute between 50-60% of revenues to international traffic. As well, CP's main line linking its system with the New England States would have no reason to exist with the elimination of this type of traffic routing.

Mr. Allen noted that international traffic in Potash is important to CP Rail and could be affected by Staggers. In 1984, CP Rail will move in the area of 4 000 000 tons into the United States, the value of which to CP Rail will be around $100 000 000.

In graphs presented at the hearing, CP witnesses noted that in 1983, total CP Rail traffic revenues were $1 890 million, while international and overhead revenues were $419 million. Total pulp and paper revenues for the company were $136.5 million of which $89.5 million were international and overhead. $85.6 million, approximately, of about $226.6 million total Atlantic territory revenues were from international and overhead traffic, and in New Brunswick, of $63.4 million total revenue, over $25 million were from international and overhead traffic.

In response to a request from Counsel for the C.C.A., CP Rail supplied information as to tons shipped and CP Rail revenues earned on traffic to the U.S. for particular products as shown in the Table below.

CP RAIL EXHIBIT NO. 4

	Year	1979	1980	1981	1982	1983	1985
Lumber[1]	(000 Tons)	1,098	825	563	533	821	671
	($ Million)	29.4	26.0	18.6	18.3	28.8	24.7
Pulp & Paper[2]	(000 Tons)	2,948	2,830	2,729	2,396	2,723	2,663
	($ Million)	60.1	67.6	71.1	67.6	74.7	78.3
Potash[3]	(000 Tons)	3,829	3,330	3,107	2,092	2,467	2,627
	($ Million)	63.7	62.3	67.7	46.9	51.5	62.3

Notes:

(1) Rail shipments of lumber from CP Rail stations in B.C. and Alberta to the U.S.A.
(2) CP Rail shipments of: Woodpulp; Newsprint; Paperboard; and Paper other than Newsprint to the U.S.A.
(3) Rail shipments of potash from CP Rail stations in Saskatchewan to the U.S.A.

D.2.3 Evidence of *Staggers* Effects

Direct Effects on CP Rail Revenues

In a letter dated October 18, 1984, CP Rail supplied up-dated information on losses resulting from the impact the passage of *Staggers* for particular commodity groups. *This information was advanced on a confidential basis*. Figures provided included losses of gross revenue (erosion), as well as loss of net revenue (attrition). These included estimates for 1984 traffic as well as an estimated total for all years since *Staggers* passage.

Figures provided showed minimal losses in 1981, but increasing losses in each subsequent year, totalling an estimated $67.9 million through 1984, with greatest losses attributed to Lumber, Paper Other than Newsprint, Automotive, Sulphur, and Woodpulp traffic. The basis of calculation was similar to that used in CP Rail's calculations on lumber traffic examined during the hearing.

CP Rail provided the hearing with examples of harm suffered as a result of Staggers but did not provide an estimate of the total revenue impacts on their operations publicly to the hearing.

Mr. Côté stated that the effects of Staggers on CP's operations are difficult to measure as sufficient time has not elapsed to show the true impact.

However, some specific examples of harm noted by Mr. Côté included:

-- Decline in Wells River, Vermont, share from 29% to 16% of area newsprint due to confidential contracts by U.S. railways. Wells River is CP Rail's favored interchange point.

-- Revenue loss on Woodpulp from British Columbia moved to the Northeastern United States, attributed to Conrail route cancellations. $1.5 million was lost, according to Mr. Côté, before CP Rail regained the long-haul routing -- at the price of an annual grant of $100 000 from CP Rail to Conrail.

-- Revenue of $2.9 million lost for the period 1981-1983 on Western Canadian pulp and paper traffic moved to N.E. U.S. destinations by western rather than eastern gateways. Decline in eastern route share from 96% in 1979 to 48% in 1983 attributed to Conrail route cancellations and rebates offered by other U.S. carriers.

-- Loss of New England overhead traffic to U.S. carriers was attributed to having to file tariffs while American carriers could offer confidential rates. This loss was not quantified.

-- Loss of $1 million for the period 1982-1984 from lower prices on traffic from Pulp mills in British Columbia, required to meet competition from Burlington Northern (BN).

Mr. Allen noted further examples of CP Rail revenue loss which he attributed to U.S. Rail deregulation, including:

-- Decline in CP Rail share of Saskatchewan Potash moving to Alabama and Delaware from 50% prior to 1982 to 15% in 1982 and 1983. The traffic could amount to as much as 140 000 tons per year and provide CP Rail revenues of up to $3 million annually. Attributed to U.S. contracts. CP has recovered some traffic which now moves via the Soo Line.

-- $200 000 lost since July 25, 1981 on woodpulp moved from Prince Albert, Sask. to Eastern U.S. as a result of Conrail route cancellations.

-- $250 000 lost since September 1982 on Newsprint moved from Northern Ontario to Dayton, Ohio as a result of a Soo Line contract.

Mr. Dodge estimated that CP Rail had lost revenues totalling a projected $11.1 million to the end of 1984 on lumber traffic which it retained in the face of Burlington Northern actions. Burlington Northern had offered rates reduced between 10% and 18% below those previously in force, for lumber destined to points local to that railway. CP Rail therefore published a new tariff for traffic which might have been trucked to Burlington Northern for furtherance, resulting in the estimated losses due to rate reductions. CP Rail's ability to compete is somewhat restrained as they must interline traffic to most destinations while BN may have single line routes in a majority of instances and be able to retain full revenues.

In adddition to this loss through eroded revenues, CP Rail estimated that it will have lost $16.4 million in revenue during 1982/84 on traffic formerly moved by CP Rail but now trucked to BN despite the lower CP Rail rates now published. As published rates are currently competitive, according to CP, this loss of traffic makes it appear that Burlington Northern is offering a rebate allowance in addition to its reduced rates.

According to Mr. Dodge, "Refusal of U.S. carriers to participate in traditional routes" is also a problem. In the example cited, Burlington Northern would not agree to a new level of rates via CP Rail's preferred gateway which would have made that route competitive with Burlington Northern single line routes. BN does, however, still participate in the routing under pre-Staggers rate levels.

Mr. Ritchie, in his evidence, noted that prior to Staggers, price setting in the U.S. had generally been done through rate bureaux on joint routes. U.S. law now required, however, that only direct connectors participate in discussions on rates for joint routes, and that there could be no joint discussion of single line rates. Independent actions rather than rate bureau decisions have become the norm.

Where rates were processed through rate bureaux, CP Rail and CN Rail could jointly discuss rates on traffic moving within Canada, as permitted under Canadian law. Where rates are not set through such bureaux, the Canadian carriers could not jointly discuss international through rates. In response to questions as to the changing frequency of joint discussions on these rates, CP Rail supplied the following Table in their letter of October 18, 1984 to the CTC:

INTERNATIONAL RATES FILED THROUGH BOTH
CFA(E) AND CFA(W) BY ALL CANADIAN CARRIERS

Year	Proposals Through U.S. Bureaux	%	Independent Announcements	%	Total
1979	1451	85	246	15	1697
1980	1178	76	367	24	1545
1981	555	24	1775	76	2330
1982	263	8	2875	92	3138
1983	118	4	3011	96	3129

Under questioning, Mr. Ritchie stated that despite problems caused by Staggers, traffic in all commodities discussed had been profitable and that CP Rail had provided new equipment for all these commodities in the past five years.

Mr. Ritchie also noted that CP Rail had engaged in allowance contracts. According to Mr. Côté, practically all CP's overhead traffic at the present time would be under allowance contract of one kind or another, otherwise their rates would not be competitive with their competitors. Mr. Ritchie noted that these contracts were filed with the C.T.C. as well as with the Interstate Commerce Commission, as required by Canadian law. On re-direct examination, Mr. Côté stated that it was noted in the filing with the CTC that allowances were paid and that these were paid on the American leg of the journey.

Mr. Allen noted that CN Rail had gained the Potash traffic lost by CP Rail to which he had earlier alluded. Mr. Ritchie stated that there were other examples where traffic lost by CP Rail had become traffic gained by CN Rail in the post-Staggers environment. The sulphur traffic earlier mentioned was one such example. Another was automobile traffic previously routed CP Rail Windsor-CSX Corp. which now moved CN over Port Huron to Grand Trunk as a result of a contract with the latter railway.

Mr. Ritchie remarked that a major effect of Staggers has been the emergence in the past five years of four "mega railroads" in the U.S.: "the BN-Frisco alignment, the CSX Corporation, the Norfolk Southern and the UP Mopac System". These companies are powerfully positioned as they control vast areas for received traffic which originated in Canada. Consequently, they are powerfully positioned in route and division negotiations. The Canadian railways can gain leverage only through using truck delivery from a friendly road that is in the same general geographic area, he said, and will, in future, require whatever aid may be gained from changes in the Canadian law currently sought.

Other CP Rail testimony concerning effects of Staggers dealt more with strategic trends and non-quantifiable effects and are dealt with under appropriate headings in the following sections.

D.2.4 Position on Legal Issues

Antitrust Immunity

Mr. Ritchie stated CP Rail's position that intermodal rather than intramodal competition had been the goal of Canadian legislation. Section 279 of the Railway Act was enacted consistent with this policy in 1967. Other explanations offered by CP Rail for antitrust immunity granted in Canada for collective pricing by railways were that it was an offset for imposed public obligations and that is was made in recognition of the existence in Canada of only two transcontinental railways, one a Crown corporation.

Existing anti-trust immunity in Canada aided regional economic development by permitting rate groupings, rate parity, consultation on joint through rates and port parity.

On urging by the Canadian railways and some shippers, the U.S. Congress had given some support to a request for anti-trust immunity in the U.S. for Canadian railways, and further support was given for this proposal in the form of a diplomatic note to the U.S. Secretary of State by the Canadian government. Consequently, the Interstate Commerce Commission agreed in 1981 to treat all Canadian railways as one integrated enterprise in respect of rates processed through rate bureaux.

However, joint through rates are not now commonly processed through rate bureaux, and the railways are currently requesting Canadian government support to reobtain a grant of anti-trust immunity from the ICC which would not be limited to rates processed through bureaux.

Allowing Canadian railways to view the contracts of other Canadian railways, should confidential contracting be permitted in Canada, would, in CP Rail's view, be consistent with Canadian policy permitting collective pricing. However, CP indicated that this would only be possible if adequate protection from U.S. anti-trust laws is afforded under the proposed CN/CP Agreement.

Legality of Contract Rates

CP Rail submitted that it could not establish a contract which contains rate clauses which aren't published. However, on joint international through rates, it is not clear that such contracts made by U.S. railways on Canadian originated traffic would be illegal.

CP Rail argued that doubt as to the legality of contract rates was itself a reason for changing Canadian law to make it clear that Canadian shippers and carriers should be permitted to enter into confidential contracts on international traffic. The existing condition of doubt, in their view, was itself an inhibiting factor which kept parties in Canada in an inferior position to U.S. counterparts in obtaining the lowest possible transportation rates, under the condition of maximum profitability.

CP was of the view that this difference between Canadian and U.S. law has injured CP Rail's competive position vis à vis U.S. railways, as noted in previous examples. The obligation to publish rates and conditions of carriage in Canada which would be confidential in the U.S. is also a disadvantage to Canadian shippers, in CP Rail's view. This is because considerable time and effort may be put into negotiating a particular imaginative rate package with CP Rail which would immediately be divulged to all its U.S. competition.

CP Rail stated that allowance of confidential contracts on international traffic was one of the measures required by Canadian railways and shippers to equalize their competitive positions with their U.S. counterparts. In CP's opinion, to deny Canadian railways this simple solution is to handicap a major Canadian industry to the sole benefit of the interests of a foreign country or to a selected group of Canadian shippers which has been able to take advantage, due to geographical location, of advantages under both sets of laws.

In argument, CP Rail stated that confidential contracting by and between Canadian shippers and U.S. carriers is endemic to international rail transportation. Such advantages should be available to all, CP submitted, or to none.

Route Cancellations and Surcharges

CP Rail argued that their evidence provided at the hearing as well as other evidence provided on a confidential basis established a loss of long-haul traffic to U.S. railways resulting from the U.S. railways' greater freedom to cancel and surcharge rates. CP Rail contended that insofar as rates to Canadian shippers would not be raised by competition between carriers, the Canadian public interest was identical with the interest of Canadian railways and the doctrine of "buy Canadian" should dictate that the Canadian enterprise, not the foreign enterprise, has in principle the right to the better share. Canadian railways were handicapped in this competition with U.S. railways, however, as route surcharges and cancellations by Canadian carriers could be appealed and disallowed in circumstances where U.S. ones would stand. This removed all bargaining power from the Canadian carrier.

CP Rail submitted that while the U.S. railways have the right to cancel and the Canadian connectors have no corresponding right, the Canadian carrier will, in each case, be left with the short haul.

The Canadian railway could not secure return to the route involving its long-haul by bargaining with shippers because that route has been wiped out by the U.S. cancelling action. Unless Canadian railroads have the ability in appropriate circumstances to surcharge and cancel routes, the right to contract confidentially, even if granted to them, would be perhaps an exercise in futility, CP argued.

"... The Canadian railways... require the weapon only as ancillary to the right to contract to be employed only to correct prior adverse action taken against them by the U.S. roads."

Exemption of "Bridge" Traffic from Economic Regulation

Section 287 of the Railway Act should be amended to remove overhead traffic from economic regulation by the CTC, according to CP Rail. The company had adduced evidence of a decline in revenues from such traffic due to differences in regulation between Canada and the U.S.

In addition, CP Rail argued that by moving bridge traffic, the company in effect was exporting a service, and providing a multimillion-dollar export industry which represents sheer profit to Canada since Canadians, apart from the railways themselves, are not involved in a penny of cost in its generation.

Limitation of Liability

CP Rail noted the distinction between current Canadian regulation on liability requiring CTC concurrence in limitation and current U.S. law permitting carriers to limit liability by contract or through publication of limited liability rates. CP further distinguished that the Canadian railways' need for corresponding changes in Canadian regulation was caused by differences applying on northbound (into Canada) shipments. In Canada, the CTC has the discretion to grant remission of liability with the shipper's consent, but the U.S. shipper is not likely to consent to the reduction of the Canadian carrier's liability because it believes that if it cannot claim against the U.S. carrier it could insist upon its right to claim against the more vulnerable Canadian carrier.

Rate Relationships

CP Rail witness Mr. Dodge indicated that rate parity was no longer achievable. This was, in Mr. Dodge's view, mainly due to confidential contracts. Single line rates had also been effective in eliminating traditional relationships, as in lumber. Mr. Dodge referred to evidence noted in section D.2.3 above where rate action by Burlington Northern resulted in a new tariff being published by CP Rail. Mr. Dodge suggested that a lot of traffic is moving under a second tariff which did not have the same type of rate grouping.

CP Rail argued that maintenance of rate relationships required knowledge of two substantially equal rate bases to which equal rate increases or decreases could be applied. In CP Rail's view, this knowledge was not possible due to two factors: (1) confidential rebate contracts and (2) the coersion of U.S. anti-trust laws which made setting of common rates unachievable. These difficulties are multiplied in respect of exempt traffic, for instance traffic moving in boxcars.

CP argued that to hold the view that traditional rate relationships can or should be maintained was to ignore reality and the only solution for current problems was remedial legislative action.

D.2.5 Other Issues Raised

Indexed Price Increases

CPPA had suggested that a system of allowing increases on woodpulp rates equal to increases in U.S. cost recovery indexes would maintain rate parity. CP Rail argued that there is no authority for such a scheme in Canadian legislation. Further, the index mentioned was based on U.S. fuel, labour, tax, etc., factors rather than Canadian ones. In any case, as Staggers allowed U.S. railways no anti-trust immunity but permitted and encouraged individual pricing of routes, parity could not be preserved in any case.

D.2.6 Recommendations

CP Rail directed its recommendations towards the goal of putting the Canadian railways on an equal competitive footing with U.S. railways for trans-border traffic.

CP Rail therefore supported those points raised in the railways' joint letter to the Minister of June 18, 1984, which were reiterated in the summary of CN Rail evidence.

D.3 B.C. RAILWAY LIMITED

D.3.1 General

B.C. Rail made no submissions to the section 81 Inquiry. They presented a written brief and provided witnesses at the public hearing in Vancouver. They did not participate in the final argument at Ottawa. Messrs. A.C. Sturgeon, Vice-President Marketing and Sales, T.R. Hanna, Manager Pricing and R.W. Young, Manager Marketing and Sales appeared at the public hearing on behalf of B.C. Rail.

B.C. Rail is a provincially constituted company and operates solely within the boundaries of British Columbia. It interchanges traffic with CP Rail, Canadian National Railways and the Burlington Northern Railroad on movements originating and/or terminating beyond its line.

The railway is principally a natural resource transportation system. The majority of the traffic it handles originates on its own line. Prior to 1984, the railway depended on the forest industry for 80% of its net tonnage. Recent access to new coal fields is expected to lessen the carriers' dependency on the forest industry. As a provincial railway, B.C. Rail Ltd. is subject to regulation by the Provincial Ministry of Transportation and Highways under the Railway Act of B.C. While the Act requires tolls to be approved by the Provincial Minister of Transportation, before they become effective, it is silent as to appropriate rate levels and there isn't any requirement for rates to be compensatory.

D.3.2 Potential Scope of Staggers Impact

B.C. Rail is in a unique position. It has no direct economic regulatory interface with the CTC or the ICC on traffic and tariff matters. This means that it must rely on interline carriers and/or tariff bureaux to publish and file tariffs in respect of joint international traffic originating on their line. Mr. Sturgeon indicated that the post Staggers era now permits them to deal specifically with direct interline connectors which expedites the availability of rates to customers. By the same token, B.C. Rail has not suffered any apparent traffic attrition through route closures or rebate contracts. It was considered however that a concerted effort was being made by an unnamed U.S. carrier to capture B.C. Rail traffic. This was being achieved by moving traffic from B.C. Rail points over the highway into the Vancouver area to a reload centre for movement by rail to U.S.A.

D.3.3 Evidence of Staggers Effect

B.C. Rail view the ability of U.S. lines to issue confidential contracts with concern. By law, they cannot charge a rate that is less than a published rate approved under provincial law. Thus, U.S. competitors of shippers served by B.C. Rail are able to ascertain what the transportation cost of the Canadian supplier is in a given market. The Canadian shipper, on the other hand, can never be sure what his U.S. counterpart is paying as the latter can participate in a secret transportation pricing agreement. For this reason, B.C. Rail considers that Canadian carriers subject to federal regulation, in this country, should enjoy the same privilege.

D.3.4 Position on Legal Issues

B.C. Rail considered that the removal of anti-trust immunity under Staggers, in respect of collective rate-making by Canadian carriers, impinges on Canadian transportation law and practice. They urged the CTC and the Federal Government to make every effort to rectify this situation.

D.3.5 Recommendations

1. Canadian carriers should have the same ability as U.S. carriers to enter into confidential contracts on joint international movements.

2. Such contracts should be filed with the CTC and made accessible to other Canadian carriers.

3. B.C. Rail supports CN and CP in their recommendation to permit route cancellations and rate surcharges.

4. B.C. Rail considers that railways and shippers involved in international movements should be permitted to negotiate limitations of liability without recourse to approval by the CTC.

D.4 B.C. HYDRO RAIL

D.4.1 General

B.C. Hydro Rail made no submissions to the section 81 inquiry. They provided written and oral evidence at the public hearing, but did not participate in the final argument in Ottawa. Mr. G. Stevenson, Manager Railway Operations appeared before the public hearing in Vancouver, B.C. on behalf of B.C. Hydro Rail.

B.C. Hydro Rail is a division of B.C. Hydro and Power Authority, a provincial crown corporation. With the exception of trackage leased from CP Rail on that line's Vancouver and Lulu Island Branch, the operation of B.C. Hydro Rail comes under the jurisdiction of the provincial Ministry of Transportation and Highways under the same conditions as those applicable for B.C. Railway Ltd. The evidence presented to the public hearing was in the perspective of the carriers' position as a non-federal regulated entity.

D.4.2 Potential Scope of Staggers Impact

Mr. Stevenson indicated that his company originally viewed the changes contemplated by Staggers as providing a more positive competitive environment for its connecting carriers which would result in increased traffic for such parties which, in the long term, would increase volumes on their own line. This did not occur, in fact, certain traffic attrition was experienced which B.C. Hydro Rail attributes to the exercise of regulatory freedom by the Burlington Northern Railroad.

D.4.3 Evidence of Staggers Effects

Mr. Stevenson indicated that Burlington Northern had withdrawn from a number of joint international rates, forcing shippers served by B.C. Hydro Rail to pay local rates on the B.C. Hydro Rail to interchange points served by Burlington Northern Railroad, if such parties insisted on through rail service. Such interchange points are located at Huntington and New Westminster, B.C. or Sumas, Washington. Such shippers would also have the option of arranging to have their goods trucked to or from Burlington Northern stations or alternately arrange for Burlington Northern to provide direct piggyback service from and/or to ramp terminals served by the Burlington Northern.

It was also indicated that Burlington Northern had recently introduced a rate surcharge on traffic, interchanged to Burlington Northern, which is loaded in "all door" boxcars. Such equipment is preferred by many forest products shippers served by B.C. Hydro Rail.

Mr. Stevenson stated that his Company had endeavoured to meet this new competition by negotiating rate adjustments via routes served by CN and CP. However as the resulting rates must be published in open tariffs, under existing Canadian law, his U.S. competitor knows precisely what action must be taken through a confidential rebate contract to regain such traffic.

D.4.4 Position on Legal Issues

B.C. Hydro Rail stated no position on legal issues.

D.4.5 Recommendations

B.C. Hydro Rail specifically recommended that the CTC initiate immediate action to:

a) Initiate the diplomatic process to reaffirm concern with and implement change to the extraterritorial reach of U.S. anti-trust laws.

b) Allow the use of confidential contracts on shipments subject to international movement. Such contracts, which would be filed with the Canadian Transport Commission, would provide through rates as a replacement for rates presently or previously published in filed tariffs, thus minimizing the effect on long standing shipper carrier relationships.

c) Allow for rebates, or concessions such as limitation of liability in confidential contracts.

d) Allow confidential filing of international through rates (i.e., other than contracts) without general tariff publication requirements.

e) Arrange for a "watchdog" process on U.S. rail deregulation to permit prompt fine tuning of the Canadian process which should further adjustments to U.S. deregulation development.

D.5 CONSOLIDATED RAIL CORPORATION (Conrail)

D.5.1 General

Conrail made written submission only to the Inquiry and stated that they are a strong supporter of Staggers. The continuing vitality of the rail industry is heavily dependent on the measures enacted by Staggers and it was their contention that both large and small shippers have benefitted from Staggers. It was also stated that a gradual and considered transition to a less regulated environment is essential to the smooth orderly flow of traffic within the U.S. and between Canada and the U.S. Conrail outlined the reasoning for and the measures contained in Staggers and endorsed the statement submitted to the Inquiry by Mr. John Ongman on behalf of the Canadian National Railway Company.

D.5.2 Potential Scope of Staggers Impact

It was stated in the Conrail submission that the ICC's proposed coal rate guidelines which include a standard of maximum rate reasonableness provide shippers with guarantees that railways may not recover costs that have been incurred inefficiently, that railways may not set prices which require cost subsidization from which shippers receive no benefits, and that rates may be constrained by the ICC if the railway is covering its total costs.

The system of equalized joint rates was discussed in Conrail's submission and it was stated that the system resulted in higher rail cost and higher rates as joint rates were established at levels which protected even the least efficient carrier. Joint rate cancellations by Conrail have created financial incentives for the use of the most efficient routes resulting in rates which reflect the lower costs. Through rates, however, remain on all routes for which there is a demand. Conrail stated that this sytem is the only means of achieving revenue adequacy and allows all rail carriers to offer low cost, efficient routings, and the benefits therefrom to both Canadian and American shippers.

It was further stated that cancellation of joint rates by Conrail has not resulted in the cancelling of through routes as suggested by Mr. Ongman. In fact, no route or gateway has been closed because of a joint rate cancellation.

It was Conrail's contention that if a single-line route is more efficient than an alternative joint-line route, then the single line carrier must be permitted to offer lower rates as there is no legal economic or equitable justification for maintaining the same rates over two routes. The reverse situation applies as well, of course, in the principle of promoting efficient competition.

Confidential contracts, according to Conrail, are intended to allow shippers to take advantage of large volumes, location, timing of shipments, etc., and attract the most efficient service available.

The experience of the last several years has indicated to Conrail that, on the matter of collective rate making, there is no need for Canadian railways to engage in this activity on international traffic. The Canadian carriers have begun to deal with U.S. roads on a direct connector basis and rates have been and will continue to be established and shippers have benefitted from the increased competition.

D.5.3 Evidence of Staggers Effects

Conrail stated in their submission that since 1976, the elimination of collective ratemaking has resulted in fierce intramodal price competition which further resulted in benefits for both shippers and consumers. As well, this elimination of collective ratemaking has rendered it impossible to maintain an equalized joint rate system wherein all routes between two points are priced the same. This intramodal price competition has resulted in lower rates which reflect the competitive environment.

In support of Conrail's position, with respect to the positive effects of Staggers it was stated that even though the revenue per ton mile declined by 7.5% between 1978 and 1982 and rates paid by shippers by approximately 9%, from 1979 to present, most railways in the U.S. (including Conrail) are now in the black. Conrail has entered into more than 1000 contracts which represent annual earnings of over $400 million. These contracts which are tailored to specific needs cover virtually every commodity transported by rail. Chemicals, minerals, forest products, lumber, paper, grain and grain products amount to over half of Conrail's total number of contracts and involve both large and small shippers.

With deregulation of fruits, vegetables, and piggyback traffic in 1979 and 1981, the railways in general more than doubled their market share and Conrail fared even better. In 1978, Conrail handled 1 578 units of perishables and intermodal service. In 1982, the figure was 27 868 units, even with the more than 14% drop in overall carloadings from 1981. The 1983 and 1984 figures increased even further. Freed from the costs, delays, and rigidity of regulations, railways have been stimulated to compete for traffic. Boxcar deregulation has, as well, yielded similar results and Conrail has commenced the implementation of multiple independent factor through rates (MIFTRs) on boxcar traffic. These rates provide shippers with single factor rate quotations, while allowing carriers to control their own portions of the through movements. Conrail has negotiated MIFTRs with other connecting carriers on pulpboard traffic and canned goods traffic moving from the South and West respectively, each moving several thousand carloads annually.

Conrail and Burlington Northern have also concluded an agreement whereby each carrier permits the other to quote single factor boxcar rates over the entire through movement in which they both participate thereby allowing both railways to respond quickly to competitive changes. All of these newly implemented measures have slowed the rate of decline of boxcar traffic from the 10-20% per year declines of the previous three years to a decline of only 0.5% in the first 30 weeks of 1984. The number of empty boxcar miles has declined, together with the number of surplus boxcars.

In discussing rate levels, Conrail cited the example of coal and stated the following: in revenue per ton in 1982, coal ranked 15th among the 18 leading commodity groups transported by rail but ranked last in the revenue per ton mile. Between 1972 and 1982 the average rail rate for coal declined slightly even with increased demand. Between October 1, 1980 and April 1 1982 and January 1, 1984 rail rates increased only 3% compared to electricity's 18%. Conrail, in fact, reduced rates for certain movements of Pennsylvania coal to pre-Staggers levels and many coal rates have not even been increased to inflationary levels.

With respect to inter and intraterritorial joint rates cancellations, Conrail stated that less than 5% of its traffic was affected, but a savings of $50 million annually would be earned. Conrail has also taken other measures in this regard including new rate or route negotiations with shippers who feel disadvantaged by rate cancellation and publishing a scale of rates on grain and recyclables after cancelling applicable joint rates. Restructuring of grain rates resulted in a 100% increase in grain loadings within six months.

Canadian shippers have also benefitted from deregulation of Conrail in the following ways: 1) new newsprint rates amount to only 88-91% of pre-Staggers rates from Ontario and Quebec mills over routes connecting with CN or CP; 2) Conrail has initiated refund allowance contracts which allow newsprint shippers rate reductions when low cost efficient Conrail routings are used; 3) Conrail has published very low rates for application when CN or CP cars are unloaded and reloaded on the Conrail system for return to Canada; 4) numerous rates on woodpulp moving to Conrail destinations in Michigan and New York have been reduced; 5) rates on printing paper have been reduced; 6) rates are published by Conrail on commodities such as zinc, aluminum, newsprint and woodpulp for delivery to warehouses where they are stored until required and subsequently delivered by truck; 7) the type and level of Conrail's service at destination to coal, iron ore, pulpboard, liner-board, newsprint, etc., receivers has been increased without an accompanying rate increase; 8) Conrail has established lumber transfer yards at strategic points on the Conrail system.

D.5.4 Position on Legal Issues

Conrail stated that the cancelling of involuntarily maintained uneconomic joint rates is a prerequisite to competitive efficient ratemaking. It enables railways to charge demand-based prices and encourages the maximum utilization of the most efficient facilities.

With respect to the confidentiality of contracts, it was stated that the ICC is considering a revision to allow shippers greater access to contracts in special circumstances. However, it was the opinion of Conrail, that, as a general rule, the confidentiality of contracts be maintained. Mandatory disclosure would effectively diminish competition between both railways and shippers. Conrail believed that all shippers should be permitted to enter into contracts with rail companies and that Canadian shippers may have been disadvantaged by not being permitted to enter into contracts.

Conrail took exception to Indusmin's allegation that shippers have been provided with below-cost rates under contracts. If a carrier is engaging in predatory pricing, the U.S. anti-trust law provides the competitor with a remedy. Conrail firmly stated that it does not enter into any contract which does not cover the transportation costs.

With respect to refund contracts, Conrail stated that there was no reason why Canadian shipppers and consumers should not benefit from railway competition. In fact, Canadian public interest would require it.

D.5.5 Recommendations of Conrail

Conrail stated that the benefits already received by Canadian shippers as outlined in their submission would increase if the Canadian regulatory scheme resembled more closely that of the U.S. Therefore, they recommended adoption of measures in Canada similar to those implemented under Staggers. These limited deregulated proposals included:

1. All shippers should be permitted to enter into confidential contracts. Complete confidentiality of Canadian contracts should be maintained, subject only to CTC approval. Canadian contracts, according to Conrail should be permissible on both domestic and international traffic allowing for competition between Canadian and U.S. shippers.

2. Canadian carriers should have the same rights as American carriers and it should be applicable on both domestic and international traffic. The same rights of review should be given to the CTC with respect to determinations of public interest.

3. Deregulation of overhead traffic through Canada would, according to Conrail not adversely affect Canadian shippers and would benefit Canadian carriers. It should, however, be subject to ICC jurisdiction. Conrail could foresee neither harm nor benefit from limitation of liability provisions of U.S. carriers being made available to Canadian carriers.

4. There is no need for Canadian railways to engage in collective ratemaking on international traffic.

D.6 ATLANTIC PROVINCES TRANSPORTATION COMMISSION

D.6.1 General

The Atlantic Provinces Transportation Commission (APTC) made a submission to the section 81 NTA Inquiry Officers, and Mr. Craig Dickson, General Manager of the APTC presented evidence at the public hearing. The Atlantic Provinces Transportation Commission is a body financially supported by the Governments of the four Atlantic Provinces with the objective of endeavouring to obtain the best transportation services possible at a cost which will permit the Atlantic Provinces to compete in both the Canadian and foreign markets.

D.6.2 Potential Scope of Staggers Impact

The APTC did not provide any evidence showing any potential effects of Staggers.

D.6.3 Evidence of Staggers Effects

Mr. Dickson stated that, as a result of Staggers, U.S. railroads have the freedom to make confidential contract rates and that the existence of joint through rates will not be sufficient to maintain the relative competitive position of Canadian shippers selling in the U.S., nor will it be sufficient to maintain access by Canadian railways to their traditional traffic and routings.

In response to questioning concerning the fact that approximately 40% of the traffic passing over the CP line that serves Saint John is overhead (U.S. to U.S.), the witness stated that if overhead traffic, as well as international traffic, contributes to the viability, the profitability, and helps to keep the cost of freight rates for domestic producers of the Atlantic Provinces moving over those lines down, then the APTC is in favour of the continuation of this overhead traffic.

APTC stated that the majority of traffic shipped from the Atlantic Provinces to the U.S. moves under international through rates. He was unaware of any confidential contracts in the United States with U.S. railways and had not made any effort to find out.

Mr. Dickson expressed concern that shippers would be harmed should the railways be given the freedom to cancel routes. He stated that freedom for the railways to cancel routes and surcharge rates is a means of the Canadian railways to take a retaliatory action against their U.S. counterparts when they have some disagreement. As an organization representing the shippers, it was the APTC's view that the cost of such retaliatory action may very well be placed upon the backs of the shippers, and the shippers in Atlantic Canada really don't feel that the Canadian railways are terribly handicapped or unduly handicapped in responding to actions of the U.S. railroads.

D.6.4 Position on Legal Issues

The APTC stated that rates under the jurisdiction of the Canadian regulatory regime must be filed with the Canadian Transport Commission and open to public inspection. Confidential rate action and rebates are illegal in Canada on traffic subject to the CTC's jurisdiction.

It is the opinion of APTC that Canadian railways and Canadian shippers should be able to enter into confidential contract rates on traffic moving from Canada to the United States and that the necessary statutory changes should be made. A co-incident change must also be made prohibiting Canadian railways from consulting and agreeing upon publication of common rates on such traffic. The APTC is in favour of confidential contract rates being available from Canada to the United States, but not from the United States to Canada. In response to questioning, Mr. Dickson stated that it was a concern of shippers in the Atlantic Provinces that if the same opportunity existed for confidential contract rates northbound, some of the companies in the United States that certainly have much larger production and markets available to them, could displace some domestic producers in Canadian markets. However, he could provide no information to show that that situation has, as yet, occurred.

The witness expressed concern that to the extent that changes are recommended as a result of this inquiry which will affect the degree of regulatory control over the rail movement of Canada export and import traffic, it is essential that traffic moving via both Canadian and United States ports be treated in a like manner to the maximum extent possible.

Anti-trust Immunity

Mr. Dickson stated that the APTC did not support the repeal of section 279 of the Railway Act for domestic Canadian traffic. As the four Atlantic Provinces are largely served only by CN, the APTC did not see any real advantage to them of a repeal of section 279.

Limitation of Liability

The APTC stated that shippers in the Atlantic Provinces using rail services to the United States are generally not supportive of the railways' proposals to limit their liability by amending General Orders T-5 and T-6. Furthermore, these shippers are of the opinion that the railways are not taking full advantage of limitations of liability that can be secured under these General Orders. Mr. Dickson, in response to questioning by CN, stated that the shippers in the Atlantic provinces would not want to see a blanket limitation of liability on international traffic, but if confidential contract rates are to be negotiated between shippers and railway, shippers would be willing to consider that liability question as one of the bargaining chips that could be considered in arriving at that contract.

It was the position of the APTC that if the railways are not satisfied with the limitation currently existing under T-5 and T-6, they are free to apply under section 294 of the Railway Act for a variation of that limitation.

D.6.5 Other Issues

The APTC raised the question of service by a second railway at Halifax through the establishment of running rights to that port in order to provide competition for CN Rail.

D.6.6 Recommendatins of the Atlantic Provinces Transportation Commission

Recommendations of the APTC were as follows:

1. Canadian legislation should be amended so as to allow confidential contracts and rebates only on traffic moving from Canada to the United States and on traffic moving through Canadian ports, either to or from overseas.

2. The railways should not have the ability to agree upon common rates under confidential contracts.

3. There should be service by two railways to the Port of Halifax in order to provide that port with competitive rail service.

4. The railways should not be given the ability to cancel routes or to surcharge traffic.

5. There should be no changes to the statutory or regulatory provisions regarding limitation of liability.

D.7 THE CANADIAN INDUSTRIAL TRAFFIC LEAGUE

D.7.1 General

The Canadian Industrial Traffic League (CITL) represents approximately 500 members who are industrial and commercial users of transportation services. The CITL presented several documents to the Inquiry and Mr. J.D. Long, president of CITL appeared at the public hearing. CITL's evidence included the results of a member survey which included responses by 25 firms with total rail traffic of nearly 15 million tons per year between Canada and the U.S.

D.7.2 Potential Scope of Staggers Impact

Mr. Long stated that the most problematic issue facing the League concerned the unknown impact that Staggers may have, not only on the international marketplace, but also on the domestic marketplace. In fact, eighty-eight percent of their survey respondents indicated that U.S. shippers have gained a competitive advantage over their Canadian competition in the domestic market place due to Staggers. Some sixty-four percent of the respondents to the survey felt that, were Canadian importers to receive rate benefits similar to their U.S. counterparts, it would enable the imports to potentially hurt the Canadian manufacturers.

Forty-four percent of the survey respondents indicated a negative impact on domestic traffic if tariff filing on such traffic remained, while tariff filing on international traffic was not required by law.

CITL stated that if the Canadian lines are to remain viable and profitable in their international operations, they must be able to compete on equal terms with the U.S. lines. The consequences of not being able to compete may be that they would have to seek higher revenues on their domestic operations to remain viable in total.

Mr. Long stated that Canadian shippers have overwhelmingly indicated that Canadian railways should not be allowed to initiate arbitrary route and switching cancellations and appropriate regulatory checks and balances should be maintained when a cancellation is proposed.

D.7.3 Evidence of Staggers Effects

According to responses to the CITL survey of its members:

1. Eighty-eight percent of the respondents who use rail services believe benefits may be gained by resorting to U.S. railways at the nearest border point rather than prolonging their haul with Canadian railways.

2. Seventy-two percent of the respondents favour confidential contracts with incentive allowances on international traffic. The CITL concludes that if Canadian railways wish to retain this traffic they must

be able to offer the same incentive provisions as are offered by the U.S. lines.

3. Seventy-six percent of the respondents felt that any move towards deregulation of the Canadian railways should not include permission for the railways to arbitrarily cancel routes and switching arrangements.

4. Eighty-eight percent of the respondents felt that U.S. shippers have gained a competitive advantage over their Canadian counterparts as a result of Staggers.

Other statements based on this survey and highlighted by CITL included:

- Nearly half of the respondents believed that the inability of CP/CN to discuss international rate matters collectively does not affect them.

- By a narrow majority, League member respondents believed that the Canadian government should request the U.S. government to urge the Interstate Commerce Commission to render a favourable decision in the matter of the CN/CP Agreement (immunity from U.S. anti-trust laws on international traffic).

- Eighty percent of the survey respondents wanted Canadian regulations adapted to the U.S. system of regulation.

- Eighty percent of those who responded to the survey felt that U.S. shippers have gained a competitive advantage over their Canadian competitors in the Canadian market place.

- By a narrow margin, the respondents preferred that the Canadian railways not be allowed to price collectively on international traffic.

D.7.4 Position on Legal Issues

The CITL purposely avoided detailed discussion of the legal issues although they were greatly concerned about the potential conflict between Canadian and U.S. law as a result of Staggers.

D.7.5 Other Issues Raised

The League was concerned over the difficulties pertaining to a situation whereby Canadian importers may divert their traffic from shipment through Canadian ports (deterred by the requirement for published rail rates in Canada) to shipment through U.S. ports (attracted by the availability of confidential contract rail rates in the U.S.).

D.7.6 Recommendations

1. The League stated that Canadian shippers should have the benefit of confidential contracts and incentive allowances, particularly when accessing U.S. markets.

2. Arbitrary route and switching cancellations should not be permitted.

3. With respect to overhead traffic, the CTC should relinquish its needless regulatory control and jurisdiction.

D.8 CANADIAN MANUFACTURER'S ASSOCIATION

D.8.1 General

The Canadian Manufacturer's Association (CMA) made a submission to the section 81 Inquiry Officers and presented oral and written evidence to the hearing. Mr. G.K. Gray, Manager, Transportation, CMA, appeared as a witness at the public hearing.

Approximately seventy-five percent of all goods made in Canada are produced by CMA member companies. Transborder trade is of paramount importance to members of the CMA and, consequently to the Canadian economy.

The CMA witness stated that it was the opinion of members of the Association based on personal experience and by thorough investigation of the issues, that Staggers has affected Canadian railways and shippers sufficiently to require changes in Canadian regulation. They also stated that deregulation has given U.S. railroads a new flexibility which has provided a net beneficial effect for shippers engaged in international rail traffic.

D.8.2 Potential Scope of Staggers Impact

Mr. Gray stated that Canada's largest market and toughest competitor has the advantage of a less regulated railway system. Both this export market and the products imported from the United States are critical to the health of Canada's manufacturing sector. Manufacturers must have the means of off-setting the liability created by current Canadian railway regulations as North America has become one single market for goods and services, including transportation services. Canada's only course is to adapt to American railroad deregulation.

D.8.3 Evidence of Staggers Effects

According to CMA, deregulation has transformed traditional rate relationships to such an extent that the concept of parity with U.S. railroads cannot be maintained. Furthermore, the extraterritorial reach of U.S. anti-trust laws has impacted traditional joint international through rate structures to such a point, that proportional rates are now used in Canada to reach the international border crossing point. Confidential contracts provide incentives in the form of lower rates and confidentiality of rates to shippers to short-haul Canadian railways. Lower rates result from rebates. The rebates have had a negative effect on Canadian railways while enabling U.S. shippers to penetrate additional markets thereby adversely affecting competition from Canadian goods.

Another problem created by Staggers is the allowances of U.S. railways to unilaterally cancel joint international routes and to surcharge a portion of a joint movement resulting in a loss of revenue for Canadian railways. However, the CMA does not support the notion of the Canadian railways being given the same right inasmuch as there is no effective process for appealing these actions.

D.8.4 Positions on Legal Issues

CMA maintained that shippers require joint international through rates inasmuch as they provide the most appropriate rate structure for the movement of transborder traffic. The rate filing and publication requirement, which exists in Canada but not in the U.S., is causing proportional rates to be filed to the border on international traffic. This is taking its toll on shippers in freight charge terms as well as in negotiating time and cost. CMA contended that to facilitate the economic movement of transborder freight, Canadian regulations must be changed to provide for and encourage joint through rates and stated that this could be accomplished by no longer applying the following sections of the Railway Act to these rates: 286, 287 and 381.

D.8.5 Other Issues

The CMA did not raise issues which were unrelated to the current investigation.

D.8.6 Recommendations

The CMA submitted that Canadian manufacturers must be able to compete on an equal footing with their U.S. counterparts. This may best be achieved by permitting confidential railway contracts on international traffic and by amending section 279 of the Railway Act in such a manner as to disallow the railways from having access to any but their own contract information. For commodities which have been completely deregulated in the U.S., and for which filing of the applicable confidential contracts is not required, similar treatment should be accorded this type of contract in Canada.

The CMA supported the granting of rebates and recommends the amendment of section 287 of the Railway Act in order to remove overhead traffic (U.S. to U.S. via Canada) from the jurisdiction of the CTC.

The CMA recommended that shippers and railways engaged in international traffic should have the freedom to negotiate liability terms. U.S. rebating is having negative effects on Canadian railways and is permitting U.S. shippers to penetrate additional markets thereby impacting adversely on competing Canadian goods. To diminish these negative effects, CMA recommended that rebates (as part of confidential contracts) should be permitted in Canada on international rates. This would require rescinding sections 380 and 381 of the Railway Act.

D.9 CANADIAN CHEMICAL PRODUCERS' ASSOCIATION

D.9.1 General

Members of the Canadian Chemical Producers' Association (CCPA) met with section 81 Inquiry Officers for initial discussion of the effects of U.S. rail deregulation and Mr. David Goffin, a lawyer on the staff of CCPA, presented oral and written evidence at the public hearing in Calgary.

The CPPA represents 66 member companies which produced approximately 75% of the $9.3 billion worth of industrial chemicals and synthetic resins manufactured in Canada in 1983. The industry consists of three sectors: petrochemical, inorganic chemical and specialty chemical; transportation plays an important role in all three sectors. The CCPA submitted that the available evidence does demonstrate a need for change in Canadian transportation law and that Canadian transportation policy must be responsive to changes in the transportation policies of our major trading partners when such changes impact on the competitiveness of Canadian industry.

D.9.2 Potential Scope of Staggers Impact

CCPA stated that the chemical manufacturing industry has emerged in recent years as the fifth largest industrial sector in Canada and an important factor in the industry's success has been its determination to move significantly into export markets. In order to ensure competitive access to both export and domestic markets, it was stated, Canadian transportation policies must be responsive to changes in continental transportation policies. The extent of Canada's trade with the United States in chemicals makes Staggers particularly significant to CCPA member companies. Canadian petrochemical producers require access to a competitive Canadian transportation system and must be able to exploit the U.S. free market transportation environment in conformance with both U.S. and Canadian laws and regulations, if they are to compete in U.S. markets. Well over half of the inorganic chemicals produced are destined to such export-oriented Canadian industries as agriculture, mining, mineral fuels and paper. The ability of these industries to compete in export markets and the effect of Canadian transportation policy was of great concern to CCPA members.

D.9.3 Evidence of Staggers Effects

CCPA's sixty-six member companies were surveyed to determine how important confidential contracts were to them, and how this might change during the remainder of the decade. Forty-three member companies responded to the survey and the results were as follows:

1. Twenty-two companies expect to ship 2.7 million metric tonnes of chemicals and chemical products into the United States by rail during 1984.

2. Twenty companies stated that approximately 33% of this traffic was moving in whole or in part according to terms

of confidential contracts filed with the Interstate Commerce Commission.

3. Member companies forecast that this proportion was expected to increase to 60% between then and the end of the decade.

CCPA remarked that the results of this survey demonstrated the considerable importance of U.S. export markets to CCPA member companies and the widespread use of confidential contracts by members to assist them in penetrating this market. CCPA cautioned that although the proportion of traffic already moving under confidential contracts may appear high, it must be borne in mind that the question asked for the proportion moving in whole or in part under confidential contracts. CCPA stated that it was reasonable to assume that much of the international traffic in 1984 moved in part under confidential contracts.

CCPA recognized that confidential contracts and rebates in the United States have made it more difficult for Canadian chemical manufacturers to compete with American competitors in both domestic and export markets. Competitors based in the United States are able to search Canadian freight tariffs and ascertain Canadian freight costs. Thus the U.S. competitor only has to estimate Canadian production costs for his pricing analysis. Canadian companies now have to make greater efforts to obtain similar rate information by intelligence gathering in the United States marketplace. The Canadian company must also estimate the confidential rebate from the U.S. carrier to the U.S. competitor. This is usually overestimated in order to minimize the risk of losing business. Thus, the Canadian company finds it necessary to estimate both U.S. freight rates and U.S. production costs in completing its pricing analysis. Even when the Canadian manufacturer successfully completes such a pricing analysis, the added transaction costs he incurs in reacting to confidentiality in the United States has a negative impact on his profitability.

The CPPA stated the following example:

> A Canadian chemical manufacturer may ship a chemical product from Edmonton to a market in Toronto. In the Toronto market he may compete with a U.S. chemical manufacturer shipping the same chemical product from the U.S. Gulf Coast into Toronto. The U.S. competitor can improve his chances of competing in the Toronto market by reducing his rail transportation costs in the United States thorugh a confidential contract for an effective rate less than the published Canadian freight rate.
>
> The Gulf Coast manufacturer can ship his chemical product to Buffalo, New York under such a contract. If Canadian law is amended to permit confidential contracts for international movements only, the Gulf Coast manufacturer will then be able to contract freight rates right into the Toronto market. Meanwhile, nothing at all has been done to assist the Edmonton supplier in his domestic movement. He will only be assisted

by permitting confidential contracts for domestic traffic. Although this would mean that Canadian companies would know less about rates charged to their Canadian competitors, at least it would result in all North American shippers competing on the same terms.

D.9.4 Position on Legal Issues

Section 380 of the Railway Act

CCPA submitted that section 380 of the Railway Act should be amended to permit contractual agreements including rebates that are not required to be published.

Section 279 of the Railway Act

The CCPA stated that the anti-combines immunity which the railways enjoy in section 279 should be repealed; they concurred with the exchange of cost information aspect but contended that it should be limited to the purposes of the Railway Act. The pricing part of section 279 should only permit the railways to meet together for the purpose of establishing joint rates. They suggested that a Commission order or regulation could be promulgated to confine collective pricing to joint rates.

Section 23 of the National Transportation Act

CCPA stated that their members have generally found that section 23 does not provide useful protection for shippers; however, they added that it may serve a purpose in protecting the public interest. CCPA stated that it does not object to the railways' suggestion that elimination of section 23 be considered. At the same time, however, some alternative form of shipper protection should be devised to address cancellation of routes and joint rates, surcharging of joint rates and protection for the captive shippers.

Sections 269(4) and 275(1) of the Railway Act

CCPA suggested that the requirement to publish tariffs of freight rates in Canada should be discontinued because the railways no longer enjoy a natural monopoly. CCPA feels that competition is a more effective regulator of tariffs than their publication. They suggest that an opportunity may arise for private enterprise to establish transaction information intelligence services. For those shippers who use published tariffs as a comparative standard and fear that without such a standard, greatly increased opportunities for rate differentiation between large and small shippers may occur, CCPA proposed the publication of a maximum rate schedule thus leaving the parties to negotiate rates less than that level. Therefore, CCPA contended that sections 269(4) and 275(1) of the Railway Act should be amended accordingly.

Section 294 of the Railway Act

CCPA submitted that while the railways should be generally liable for damage to goods, the limits placed on the railways' liability for such damage should generally be a negotiated term in the contract made between the shipper and the railway. Therefore, CCPA stated that section 294 of the Railway Act should be amended so that a rail carrier may establish rates under which the liability of the carrier for loss or damage to goods may be limited to a value established by written agreement between the shipper and the carrier without the authorization or approval of the Canadian Transport Commission.

D.9.5 Other Issues Raised

Section 279, Railway Act

The CCPA believed that the time has arrived for implementation of a pro-competitive railway regulatory reform in Canada. The CCPA added that although the effects of U.S. rail deregulation on Canadian chemical shippers provided the impetus for the foregoing proposal, that is not the only reason it is being advanced. They felt that Canadian industry faces a number of competitive disadvantages in terms of transportation which need to be addressed.

CCPA stated that members support the objective of railway viability but strongly object to policies which restrict competition to protect railway profits. Limiting competition to promote this objective increases the danger that excess monopoly profits might be earned. Were collective pricing between CN and CP to be eliminated, however, the CCPA stated that destructive competition would not likely ensue. The CCPA recognized that railways which currently set reasonable rates might decide to take advantage of captive shippers to compensate for rate competition at competitive points. CCPA anticipated that some of these captive shippers will likely find themselves within interswitching limits after the Inquiry into interswitching. CCPA also recognized that some shippers may be left beyond the limits, but rates for these may be reduced by the existence of direct intramodal competition a short distance beyond the interswitching limits, they suggest.

D.9.6 Recommendations of the Canadian Chemical Producers' Association

CCPA submitted that Canadian law should be amended to make confidential contracts and rebates permissible for both international and domestic rail traffic providing U.S. and Canadian railways and shippers with equal opportunities.

CCPA contended that confidentiality should also provide Canadian railways with great flexibility in pricing. Confidentiality would remove any pressure the railways might feel to extend special rates to other shippers and accordingly, the railways should be more amenable to granting them to individual shippers.

In summary, CCPA members viewed the confidentiality existing under Staggers as an advantage to U.S. shippers and a disadvantage to Canadian shippers that can be overcome by amending Canadian law to permit confidential contracts and rebates for both domestic and international traffic.

CCPA specific recommendations included the amendment of sections 380, 279, 269(4), 275(1) and 294 of the Railway Act.

D.10 CANADIAN PULP AND PAPER ASSOCIATION

D.10.1 General

This Association (CPPA) is a national organization and through its members accounts for approximately ninety-eight percent of the pulp, paper and paperboard manufactured in Canada. The CPPA presented a brief to the section 81 Inquiry Officers and also presented a panel of witnesses at the hearing in Calgary and a brief which clearly sets out the position adopted by all but three (3) of the Association's members. Certain additional information was requested of the CPPA on a confidential basis, detailing the volumes of members' newsprint and woodpulp shipments to the United States moving under joint international through rates, under confidential contracts when within the United States and with rebates when within the United States. The witnesses provided were:

1. Mr. Elwood Dillman, Group Traffic Coordintor, Minas Basin Pulp and Power, Hantsport, N.S.
2. Mr. David Schmirler, Manager of Transportation Services, MacMillan Bloedel, Vancouver, B.C.
3. Mr. Thomas Openshaw, Manager of Transportation and Distribution, Canadian Pulp and Paper Association, Montreal, P.Q.
4. Mr. John Pabke, Director of Transportation and Distribution, Abitibi-Price Inc., Toronto, Ont.

D.10.2 Potential Scope of Staggers Impact

In its brief to the section 81 Inquiry Officers, the CPPA urged caution in responding to the short-term perceived changes in the U.S. and to their impact on the Canadian transportation system. The Association was, at that time, primarily concerned with the maintenance of stability and some measure of certainty in maintaining its export potential.

By the time of its submission to the section 48 hearing, the CPPA had altered its position to one supporting, in some instances, the railways' request for changes in the regulatory environment in Canada. While continuing to express the view that group and related rate structures for international joint through rates that currently exist should continue as the maximum rate levels, the CPPA supported the allowance of Canadian carriers to offer similar proposals since:

> As our members' United States competitors have the ability to enter into such confidential contracts with United States carriers, our members must also be in the same position in order to remain competitive. Canadian railways, in order to remain competitive with United States railways, should also have the ability to enter into confidential contracts with our members

to induce them to utilize Canadian railway services for the longest possible hauls.

The CPPA urged that a simpler and more expeditious procedure be established for the handling of applications pursuant to section 23 of the National Transportation Act as, "Under the more deregulated environment, such an appeal mechanism will have to be used by individual shippers as opposed to groups or associations of shippers".

D.10.3 Evidence of Staggers Effects

The CPPA brought forward several issues and concerns related to the effects that Staggers was having on Canadian industry and carriers.

Joint International Through Rates

There was considerable discussion concerning the relevance of joint international through rates with respect to movements of woodpulp and newsprint from Canada to the United States. During the course of the hearing several statements were made which indicated that, confidential contracts notwithstanding, there is a large volume of tonnage (presumably newsprint and woodpulp) originating in Canada and terminating in the United States, that moves on joint international through rates.

In cross-examination, Counsel for the carriers attempted to get Association witnesses to agree that these rates merely constituted the maximum rates published for these commodities and that, in most instances, traffic was moving at considerably lower rates which were not published but were contained in confidential contracts issued by American carriers for that portion of the movement in the United States. Concerning the use of joint international rates and confidential contracts, Mr. Schmirier stated that in many cases joint international through rates provide a ceiling under which unpublished contracts are negotiated. He also indicated that railways in the U.S. Pacific Northwest still publish rates on woodpulp for movement on their lines, boxcar deregulation notwithstanding.

Mr. Openshaw described the traditional relationship that has existed for almost seventy years on western woodpulp movements to the U.S. and for about fifty years on movements of eastern Canadian newsprint to the U.S. He agreed that the fact that CPPA members were involved in allowance contracts could be inferred from published contract summaries.

During the hearing the CPPA was requested to provide information on a confidential basis, pertaining to the volume of newsprint and woodpulp moving 1) under joint international through rates in 1982; 2) joint international through rates in 1983 with confidential contracts; and 3) the volume moving under joint international through rates in 1983 under confidential contracts providing for a rebate. In its letter to the Commission, dated October 23, 1984, the CPPA provided a table that showed that there were approximately 4.2 million tons of newsprint and 2.9 million tons of woodpulp moving to the United States under joint international through rates. Under confidential cover the other information requested was provided. The information supplied showed a considerable volume of traffic moving to the United States under confidential contracts and also under confidential contracts which provide for a rebate to the shipper. All of this traffic is traffic that originates in Canada on joint international through rates.

Confidential Contracts

The CPPA expressed a favourable disposition to Canadian legislation being amended in favour of the Canadian railways being given the ability to offer confidential contracts.

Surcharges

While the CPPA did not present any evidence on the effects of Staggers in this area it did state that it opposed Canadian railways being given the right to unilaterally surcharge joint international through rates. In his argument, Mr. Foran, stated his understanding that as of September 30 of this year, the United States railroads no longer have the unilateral power to surcharge rates.

Route Cancellation

No evidence was adduced showing an effect of Staggers-related route cancellations. During cross-examination, witnesses for the CPPA conceded that they were more concerned with Canadian railways being able to cancel routes than they were with U.S. railroads having the same ability. Further, it was stated that the CPPA did not oppose the Conrail route closings.

Boxcar Deregulation

Mr. Schmirler stated that despite the ICC's decision to exempt boxcar traffic from regulation, individual railroads in the United States continue to publish tariffs containing rates and conditions on woodpulp movements over their lines. The CPPA urged the Commission to be very cautious when dealing with the boxcar deregulation issue since the ICC has appealed the Court of Appeals decision to the U.S. Supreme Court and the situation with respect to the deregulation of boxcar traffic could, therefore, change significantly. One of the CPPA witnesses stated that forest products traffic is included in the agricultural products exemption in the United States, although, as also stated, U.S. roads can negotiate contracts on forest products traffic with the only information filed on such traffic being a contract summary.

D.10.4 Position on Legal Issues

The CPPA was very much in favour of the maintenance of the system of joint rates for the movement of woodpulp and newsprint to the United States. The Association stated that the establishment and the maintenance of historical rate relationships, the existence of international joint through rates, and the filing and publication of such rates have been, and will continue to be, important to Association members' competitive markets.

The Association stated that these rates should continue to be filed and published and continue as the maximum rate levels for international traffic and should be increased using a quarterly cost-recovery index which is operative under Staggers.

Contracts

The CPPA is strongly in favour of the railways being able to enter into confidential contracts. However, they stated that the contracts themselves should not be filed nor should their contents be disclosed to other railways or shippers.

During the hearing, concern was expressed regarding potential car supply should the Canadian railways be able to enter into contracts and tie car supply to contracts, leaving those shippers without contracts also without adequate car supply. The CPPA stated that section 262 of the Railway Act should apply to traffic moving on confidential contracts.

The CPPA stated in argument that they did not agree with the view expressed by Canadian National Railways questioning the legality of shippers entering into confidential contracts with U.S. railways. Mr. Foran, on behalf of the CPPA, further expressed surprise with the railways' position, especially after hearing the evidence of Mr. Sturgess and the CN panel in Montreal, to the effect that Canadian National works hand-in-glove with its subsidiary, Grand Trunk Western, in arranging for confidential rebate contracts through GTW with Canadian shippers and then in the adjustment of divisions wherever required to accommodate that practice. Mr. Pabke, one of the CPPA panel of witnesses, offered the personal opinion that, for a shipper not to enter into a confidential contract under the conditions existing at the present time, would be irresponsible, since the shipper would penalize himself and reduce his competitiveness in the U.S. market and it would also penalize the Canadian railway. He then urged the Canadian Transport Commission to "...expeditiously recommend removal of this uncertainty which acts as a constraint to both the Canadian shippers and Canadian carriers. By this action the existing commercial realities will be recognized and both Canadian shippers and carriers may then expend their energies become reliable, low-cost, suppliers to that very large American market.".

Anti-trust Immunity

The CPPA stated that international traffic should no longer be exempt from the provisions of the Combines Investigation Act pursuant to section 279 of the Railway Act. Mr. Foran, in his argument, asserted that Canadian railways should not have access to information from each other's contracts because that would allow them to "stack the deck" against the shipper. Mr. Foran also stated that, while the railways say that they want equal footing with the U.S. railroads on contracts, they actually want something that is not available to United States carriers, that is, access to each other's contracts. This position is a reiteration of the position taken by Mr. Openshaw. It was stated that the CPPA has not adopted a position regarding anti-trust immunity on domestic Canadian traffic.

Limitation of Liability

The CPPA is not in favour of a blanket limitation of liability for the carriers. It is, however, agreeable that, where shippers are prepared to reduce, or even to eliminate liability limits, in consideration for rate concessions, these agreements should be allowed without requiring the approval of the Commission. This statement was not restricted by any kind of qualification (e.g., only on confidential contracts).

Surcharges

The CPPA is not in favour of Canadian railways being permitted to surcharge joint international through rates.

Route Cancellations

The CPPA was opposed to the railways having blanket authority to cancel routings and they stated that Canadian railways should continue to be permitted to cancel routings, subject to appeal by the shipper via some expeditious method of relief. For instance, as the Canadian Transport Commission could have the power to order a Canadian railway to maintain the existence of the routing it proposed to cancel until the complaint was heard and determined.

D.10.5 Other Issues

Several other issues were raised by the CPPA. The CPPA is in favour of continued regulation of interswitching with zones to be extended and the average cost of terminal handling railways to be absorbed by the line haul carrier. They were in favour of overhead U.S.-U.S. traffic via Canadian lines being exempted from Canadian railway law.

CPPA witnesses stated that traffic to and from offshore points had not been taken into consideration when preparing its position, but that if harm would come to Canadian ports as a result of Staggers induced competition from U.S. railways and U.S. ports, this matter should be looked at in order to avoid any harm to Canadian interests. In relation to questions concerning forest products traffic originating at member mills, the witnesses stated that shipments by the companies employing the witnesses to offshore markets were normally made from tidewater mills.

D.10.6 Recommendations

The CPPA recommended that there not be any change to domestic rate regulation. They recommended several changes to the system of international rates, although the joint international rate structure should be kept as a maximum level for all shipments.

1. Canadian railways should be allowed, on interna-

tional traffic, to enter into confidential contracts with Canadian shippers including provisions for rebates or allowances. Contract summaries similar to those filed with the Interstate Commerce Commission could be filed with the Canadian Transport Commission but the contracts themselves should not be filed.

2. Canadian railways should not be allowed to surcharge joint international through rates. These rates should be increased by using the cost recovery index approved by the ICC.

3. Routes may be cancelled by the Canadian railways subject to appeal and suspension by the CTC prior to an expedient review of the merits of the situation.

4. Equipment must be available to these shippers who do not ship under confidential contract. There should be a maximum limitation to the number of cars that may be permitted under contract arrangements.

5. Traffic moving between two U.S. points though Canada need not be subject to Canadian railway law.

6. Ideally the CPPA would like an international commission to monitor and regulate international joint through rates. As a minimum, they urge an ongoing dialogue and consultation between Canadian and U.S. officials.

7. Section 23, National Transportation Act must continue to apply to international traffic. A simpler and more expeditious procedure is particularly important because in all likelihood this appeal mechanism will have to be used by individual shippers as compared with groups or associations of shippers.

8. Interswitching should continue to be regulated, the zones extended and the average cost of the terminal railways should be absorbed by the line haul carrier.

9. Where shippers and carriers agree upon a reduction or elimination of liability in consideration of rate concessions, such agreements should be allowed without CTC approval.

10. International rates should no longer receive anti-trust immunity through the mechanism of section 279 of the Railway Act

11. Regulatory change other than that already outlined above should await a more comprehensive assessment of the permanence of changes in the United States and their effect on Canadian railways and shippers (e.g., boxcar deregulation).

D.11 COUNCIL OF FOREST INDUSTRIES OF BRITISH COLUMBIA (COFI)

D.11.1 General

COFI presented evidence to the section 81 Inquiry, presented written and oral evidence at the public hearing and made final argument in Ottawa. COFI also supplied certain information on a confidential basis to the Panel after the hearing. That information was a summary of member responses to a survey concerning experiences with U.S. contracts.

Mr. G.E. Bennett, the Council's Vice-President, Transportation, presented evidence on COFI's behalf.

COFI is an association of B.C. forest products companies, especially lumber producers, which acts on behalf of its members in all areas of common interest except industrial relations and direct selling. The position taken by COFI was that of a majority of its members and those of the affiliated groups, the Cariboo Lumber Manufacturers' Association, and the Interior Lumber Manufacturers' Association.

Nine COFI members out of 134 did not support the brief, according to COFI statements made in response to questioning. These dissenting members were seven large-volume shippers of woodpulp and lumber and two large-volume shippers of lumber only. Dissenting members accounted for 22 1/2% of total B.C. forest industry traffic while total COFI membership, including dissenters to the brief, accounted for 90% of the total product value of the British Columbia forest industry, according to COFI statements.

D.11.2 Potential Scope of Staggers Impact

Industry members supporting the COFI brief accounted for 220,000 rail carloads of forest products shipped to all destinations in 1983, including U.S. destinations.

While COFI did not produce specific figures on destinations of shipments by members supporting its brief, COFI supplied the hearing with figures on shipments of the B.C. lumber industry as a whole. These showed that 56.1% of all 1983 B.C. lumber shipments were to the U.S. (including shipments via reload centres). COFI also supplied by-year totals of millions of board feet of lumber moving to U.S. destinations by mode of carriage, as reproduced below.

D.11.3 Evidence of Staggers Effects

COFI polled its members and affiliates in response to an undertaking made at the hearing session in Vancouver. Fifty-eight per cent of members responded and indicated that collectively they participated in dozens of contracts, almost all of which provided for rebates.

More than half the contracts specified quantities of lumber to be moved; other contracts simply specified percentages of volumes.

At the hearing, COFI submitted that pre-Staggers rate relationships no longer existed for lumber traffic. Mr. Bennett stated that actions by U.S. carriers, particularly Burlington Northern and Union Pacific, had disrupted the relationships. Lower rates were published by these railways in competition with each other and with truckers for U.S. Pacific Northeast traffic. CN Rail published new rates to retain traffic then being trucked to BN for furtherance but this did not, in Mr. Bennett's view, completely restore the old relationships. For instance, a five cent difference between Canadian and U.S. rates in one instance to Dallas, Texas, in mid-1981 became a 42 cent difference by 1984, both Canadian and U.S. railways having lowered their rates. Mr. Bennett remarked that U.S. freight rate reductions on U.S. Pacific Northwest shipments had been as much as 30%.

BRITISH COLUMBIA LUMBER SHIPMENTS 1974-1983
(million board feet)

Destination		1974	1975	1976	1977	1978	1979	1980	1981	1982	1983
U.S.A. NORTH EAST	Road**	2.4	3.3	8.1	2.5	5.5	8.5	4.8	21.7	27.3	26.2
	Rail	672.2	619.6	732.0	575.9	580.4	539.2	450.1	215.5	232.2	316.9
	Water	573.1	403.8	621.8	771.7	683.4	588.8	355.9	398.2	355.1	476.9
	Total**	1,247.7	1,026.7	1,361.9	1,350.1	1,269.3	1,136.5	810.8	635.5	614.5	820.0
NORTH CENTRAL	Road**	9.5	9.3	15.3	15.5	28.4	50.2	38.1	62.8	76.2	88.7
	Rail	1,652.0	1,425.7	2,093.6	3,148.0	2,531.3	2,178.4	1,645.6	1,203.5	1,014.2	1,703.4
	Total**	1,661.5	1,435.0	2,108.9	3,163.5	2,559.6	2,228.6	1,683.7	1,266.2	1,090.5	1,792.1
SOUTH ATLANTIC	Road	1.7	1.9	3.3	2.8	7.1	11.6	3.8	8.3	15.3	33.1
	Rail	804.1	723.4	901.3	962.3	1,297.1	1,295.9	1,272.1	1,042.2	944.8	1,241.3
	Water	277.4	195.3	261.7	364.0	415.7	345.9	199.3	226.5	269.2	494.0
	Total	1,083.2	920.6	1,166.3	1,329.1	1,719.8	1,653.4	1,475.2	1,276.9	1,229.3	1,768.5
SOUTH	Road	1.7	2.2	2.8	3.5	9.7	11.6	15.6	14.9	41.2	62.3
	Rail	632.0	537.1	813.6	897.0	1,284.1	1,207.7	1,093.1	887.4	1,138.2	1,379.4
	Water	19.6	3.6	-	29.8	48.8	56.2	15.6	15.7	37.2	39.1
	Total	653.3	542.9	816.4	930.3	1,342.7	1,275.5	1,124.3	918.0	1,216.5	1,480.9
WEST 1)	Road	175.5	145.1	257.7	449.1	568.7	581.9	515.9	592.3	654.6	911.1
	Rail	268.5	230.2	416.4	546.2	717.6	624.9	486.9	384.3	272.8	313.7
	Water	93.1	38.1	116.7	223.9	258.5	225.5	229.2	190.0	90.2	116.9
	Total	537.1	413.4	790.8	1,219.2	1,544.7	1,432.3	1,232.0	1,166.6	1,017.7	1,341.6
TOTAL 2)	Road**	190.9	161.7	287.2	473.4	619.3	663.8	578.2	700.1	814.6	1,121.5
	Rail	4,028.9	3,536.0	4,956.8	6,129.4	6,410.5	5,846.1	4,947.8	3,372.8	3,601.8	4,954.7
	Water	963.1	640.9	1,000.2	1,389.4	1,406.4	1,216.4	800.0	830.4	752.1	1,126.8
	Total**	5,182.9	4,338.6	6,244.2	7,992.2	8,436.2	7,726.3	6,326.0	5,263.3	5,168.5	7,203.0

Source: Statistics Canada and COFI (individual columns may not add due to rounding).

1) Including Hawaii and Alaska.
2) Excluding Puerto Rico.

* From 1981 onwards, includes shipments to reload centres.
** From 1981 onwards, excludes some shipments of B.C. lumber from reload centres in Canada.

COFI submitted that traditional rate relationships should continue in all circumstances where possible. Mr. Bennett agreed, however, that maintaining these relationships on the 30% of lumber traffic moved in boxcars would be impossible. He also agreed that where there are U.S. rebate contracts, maintaining traditional rate relationships would be difficult.

Mr. Bennett stated that lumber shippers in B.C. have suffered neither monetary harm nor deterioration in service as a result of route closings. He said that the existence of reload centres has been a factor mitigating damage which might have otherwise been suffered by lumber shippers from this cause.

D.11.4 Position on Legal Issues

Anti-trust Immunity

COFI submitted that the Council is on record with the Interstate Commerce Commission as opposing the Canadian railways' request for complete immunity from the U.S. anti-trust laws and to their continued ability to collectively set rates on international rail traffic. They would, however, modify this position if COFI's proposals for rate arbitration in Canada were adopted.

Surcharges and Route Cancellations

COFI believes that Canadian railways already have ample power to cancel routes. The railways' flexibility to cancel routes on joint international traffic should be removed, and they should not be permitted to apply surcharges. Again, COFI would witdraw their objections to Canadian railway proposals if COFI's arbitration proposals were adopted.

Legality of Contract Rates

COFI stated that publication of rates by Canadian rail carriers must be retained for all traffic. COFI had taken no action to support confidential contracting legislation in the U.S. COFI's opinion was that allowances granted by U.S. railroad to Canadian shippers on the domestic U.S. portion of an international movement would not be against Canadian law. However, confidential allowances on the Canadian portion of the haul by Canadian or U.S. carriers would be illegal.

COFI would oppose granting Canadian carriers the right to make confidential contracts with Canadian shippers on the ground that this would be injurious to small or captive shippers (those in remote regions local to one carrier).

An appeal process is of no value, COFI submitted, when the rates of competitors are unknown.

COFI would especially object to introduction of confidential contracting in Canada if Canadian railways could see each others contracts. Such practice would appear to restrict competition rather than enhance it.

Limitation of Liability

COFI would have no objection to the implementation of a simplified system to limit the railways' liability on a case-by-case basis, where they are carrying an unfair share of the liability burden.

Bridge Traffic

COFI agrees with the railways' submission that such traffic is U.S. domestic traffic and the National Transportation Policy of Canada is not served through the continued jurisdiction of the CTC.

Damages Suffered by Canadian Railways from *Staggers*

COFI argued that damages to Canadian railways said to result from *Staggers* were much exaggerated. Losses on lumber traffic resulting from route cancellations by Conrail were cited especially, as an illustration that even the illustrations provided by the railways were questionable, and therefore, total damages claimed were even more questionable.

D.11.5 Other Issues Raised

COFI opposed several railway proposals as noted above, but stated that in many cases they would withdraw opposition if the Minister of Transport enacted COFI's proposals for an arbitration procedure in rate disputes and reparations where arbitration favoured shippers. These proposals had been made previously to the Minister of Transportation (then the Hon. Jean-Luc Pepin) and were appended to the COFI submission to the Inquiry.

COFI's proposals for rate arbitration are meant to apply both domestically and on international traffic. If adopted, informal mediation, as now, would be tried as the first step in resolving a rate dispute. If mediation were unsuccessful, the shipper would have a choice between following the current section 23 procedure or submitting the dispute to binding arbitration. In either case, the difference in payments required by the disputed rate and those required by the pre-existing rate would be placed in escrow as shipments were made. Should the plaintiff succeed, payments in escrow would revert to the shipper. In COFI's view, this would encourage swift resolution of disputes by all parties.

In COFI's submission, the CTC would provide a full-time administrator of arbitration who would determine whether full negotiations had taken place and appoint an arbitrator if parties could not agree on one. Not more than 10 days would be allowed for arbitration from the date an arbitrator accepts the case, unless both parties concurred in an extension. The arbitrator's decision would be final but must be for one party or the other, not some fresh compromise. Each party would bear their own costs and the loser would bear the costs of arbitration.

Interswitching Regulations

COFI submitted that this inquiry should also consider the proposals previously forwarded to the CTC's inquiry on interswitching.

D.11.6 Recommendations

COFI recommended that their proposals on arbitration and reparations be adopted. Failing that, they recommended that:

- The Canadian railroads should be subject to U.S. anti-trust laws.
- The Canadian railroads must continue to publish all rates.
- The Canadian railroads should not have the ability to enter into confidential contracts for carriage of freight.
- The Canadian railroads should have access to a simplified system to limit their liability on a case-by-case basis, where they are carrying an unfair share of the liability burden.
- section 287 of the Railway Act should be amended to remove the CTC's pricing jurisdiction over bridge traffic.
- Interswitching regulations should be amended to provide for expansion of interswitching limits, absorption of charges by the line-haul carrier and negotiation of a "fair" level or charges.

D.12 CANADIAN PETROLEUM ASSOCIATION

D.12.1 General

The Canadian Petroleum Association which is comprised of companies active in the oil and gas industry made written submissions only to the Inquiry at the public hearing held in Calgary. The Association's main concern in this matter was expressed in terms of availability of access by member companies to rail transportation services for the carriage and delivery to markets of products such as petroleum, natural gas and by-products thereof, particularly sulphur.

D.12.2 Potential Scope of Staggers Impact

The Association stated that both the increased competition among U.S. rail carriers which have resulted in lower rail rates and the allowance of confidential contracts and rebates have permitted Association members to expand their molten sulphur markets into the U.S., thus contributing not only to the growth of the oil and gas industry, but as well to the Canadian economy and the balance of payments. In the opinion of the Association, any action which results in reduced joint international through rail rates thereby allowing shippers access to a lower transportation cost and to allow shippers to tap into markets heretofore inaccessible, both international and export, can only have a positive effect.

D.12.3 Evidence of Staggers Effects

Even with certain U.S. route cancellations following Staggers, the Association stated that member companies shipping molten sulphur have not experienced to date any inconvenience or inaccessibility to markets. Shippers have also experienced no adverse effects in situations in which U.S. rail carriers have performed greater portions of the haul than in the past. In fact, they stated, higher mileage compensation provided by the American rail carriers have resulted in lower transportation costs from origin to the new U.S. markets.

D.12.4 Position on Legal Issues

The Association stated in their submission that they would be making no comment with respect to the interpretation of Canadian law.

D.12.5 Other Issues Raised

D.12.6 Recommendations

The Association made no specific recommendations, but did state that any measure which would reduce transportation costs and provide their members with access to until now inaccessible markets was, in their opinion, desirable.

D.13 PROPANE GAS ASSOCIATION OF CANADA INC.

D.13.1 General

The Propane Gas Association, comprised of producers, distributors, transporters and suppliers of LPG (propane and butane), provided only a written submission to the Inquiry. According to the Association, member companies have experienced certain effects following the implementation of Staggers, both domestically and internationally.

D.13.2 Potential Scope of Staggers Impact

The Association expressed concern over the extraterritorial reach of American anti-trust laws as such application could impede Canadian industries in doing business in the U.S. As well, the Association opposed any changes which would allow Canadian railways to unilaterally cancel routes and surcharge rates.

D.13.3 Evidence of Staggers Effects

According to the Association, the right of American rail carriers to cancel routes and add surcharges to rates has not adversely affected member companies, at least to any great extent. Factors which have contributed to a reduction in Canadian railways' revenues include routing decisions having been made concerning the disparity between American and Canadian mileage compensation paid on privately owned equipment. Specifically, Canadian rail carriers pay 44.8¢ per loaded mile compared to U.S. carriers' 75¢ per loaded mile.

D.13.4 Position on Legal Issues

The Association is opposed in principle to extra-territorial reach of U.S. anti-trust laws. The legal status of Canadian companies participating in confidential contract rates with American carriers is in doubt and could be an impediment to these companies doing business in the U.S., according to the Association. Canadian law should therefore be changed to permit contracts.

The Association was also opposed to the cancellation of routes and the surcharging of rates, favoring the retention and strengthening of section 23, NTA.

D.13.5 Other Issues Raised

D.13.6 Recommendations of Propane Gas Association

With respect to through rates to the U.S., the Association stated that through rates should continue to be published for all traffic not moving under contract rates. This would enable the industry to better compete in the marketplace and not be rendered in a disadvantageous position such as they are currently facing with competitors knowing most or all of the shipping costs of Association members while members do not share the same advantage. They also stated that changes should be made to Canadian law to allow Canadian railways to negotiate confidential contract rates on international traffic.

The proposal to eliminate section 23 of the National Transportation Act was stated to be not acceptable to Association members. In fact, they requested that a simplified procedure be established to maintain fair rate levels.

In order to ensure a level of intermodal competition, the Association stated that Canadian railways should no longer be permitted to jointly discuss freight rates.

Any changes to be made to interswitching and collective rail pricing should be done with consideration of the implications of one to the other, as well as to the ones at issue in this Inquiry, with specific reference to transportation in general in Canada.

D.14 PCS SALES

D.14.1 General

Mr. Andrew Elliott, Manager Planning for PCS Sales, met with the section 81 Inquiry Officers for initial discussions concerning the effects of U.S. rail deregulation and presented evidence at the public hearing.

PCS Sales is a subsidiary of the Potash Corporation of Saskatchewan. Approximately 60% of the company's potash sales are in North America of which 95% (over 2 million tonnes) are sold in the United States. In the context of Canadian potash sales to the U.S., PCS Sales represent approximately 30% of the total. The long distances involved in reaching the major U.S. markets and the relatively low value of the commodity result in transportation costs accounting for at least 40% of the delivered price. Inasmuch as PCS Sales transports about 75% of its product to market by rail, efficient transborder rail transportation is essential to its effective marketing program.

D.14.2 Potential Scope of Staggers Impact

PCS Sales stated that if rail traffic in the U.S. continues to be deregulated by commodity or by equipment type, U.S. potash traffic could ultimately be completely deregulated. If this were to occur, PCS Sales believes that transborder trade could be harmed largely because Canadian railways do not have the required flexibility, under current Canadian law, to respond to such situations. The witness stated that legislative and/or regulatory amendments are required to provide Canadian railways with such flexibility in order to meet the needs of certain shippers.

D.14.3 Evidence of Staggers Effects

Confidential Contract Rail Rates

Confidential contract rail rates on potash are not only available to U.S. producers, but also to offshore potash producers moving their product to U.S. inland customers by rail from a port of entry. On the other hand, Canadian producers moving potash to the U.S. by rail are required to file rates in tariffs with the CTC and the ICC; these rates become public knowledge and are, therefore, accessible to competitors of PCS Sales. This places competitors at a distinct advantage over PCS in the U.S. marketplace.

Collective Ratemaking and Exposure to U.S. Anti-trust Laws

Another major impact on PCS Sales of U.S. rail deregulation is the lack of anti-trust immunity of U.S. and Canadian rail carriers if they engage in discussions related to international rates, unless the carriers are 'direct connectors'. Prior to Staggers, Canadian and American railroads had been able to develop institutional arrangements which had enabled the free transborder flow of goods in conformity with the laws of both countries. Since Staggers, a railroad acting in accordance with Canadian law may concurrently be in contravention of U.S. anti-trust law.

D.14.4 Position on Legal Issues

PCS Sales stated that Canadian railways should no longer be permitted to agree upon and charge common rates on transborder rail traffic (section 279, Railway Act).

section 287 of the Railway Act should be amended to allow Canadian railways to transport commodities from U.S. origins, across Canadian territory to U.S. destinations, without having to make the rates public on the Canadian portion of the movement. This overhead rail traffic, PCS believes, should be free of Canadian economic regulation in order to render Canadian railways competitive with U.S. railways. Mr. Elliott added that, concurrently, section 382 of the Railway Act should be rescinded to permit Canadian shippers to ship from a point in Canada to another point in Canada, via the U.S., without requiring that the traffic move on a joint through rate.

Under cross-examination, Mr. Elliott disclosed that PCS Sales had become party to more than a dozen confidential contracts with U.S. carriers on the U.S. portion of the international movement. However, the witness declined to answer whether PCS received allowances (rebates) off the tariff filed with the CTC in regard to such confidential contracts since he was not prepared to reveal publicly the terms and conditions of the contract.

D.14.5 Other Issues Raised

In the opinion of PCS Sales, Canadian railways have the option of competing on transborder traffic or of agreeing upon common rates to border points. The risk involved in the latter option is that the United States may attempt to apply anti-trust laws to Canadian railroads. PCS Sales was of the opinion that these problems are resolvable within existing legislation; the fact that Canadian railroads have not pursued resolution of this conflict has impeded transborder trade.

D.14.6 Recommendations

PCS Sales stated that Canadian railway legislation should be amended to permit confidential contracts between shippers and carriers on transborder rail traffic. These contracts should be filed with the CTC only if it is deemed that there is a need for the CTC to review the impacts of contracts. The contracts, however, should not be made public in any form. PCS Sales sees no compelling reason why a contract should be made accessible to a rail carrier who is not a party to the contract.

PCS Sales believes that Canadian railways should no longer be allowed to agree upon and charge common rates on transborder rail traffic (section 279, Railway Act).

PCS Sales recommended that the CTC should review the need to file and publish rail rates on transborder traffic. They also recommended that overhead rail traffic between two U.S. points via Canada should no longer be subject to Canadian economic regulation (section 287, Railway Act) and that, concurrently, section 382 of the Railway Act should be rescinded to permit

Canadian shippers full commercial freedom to move commodities between two points in Canada via the U.S. Alternatively, PCS Sales recommended that the promotion of short line railroads in Canada to connect with U.S. carriers should be examined as a means of broadening the competitive alternatives available to Canadian shippers.

PCS Sales asserted that the Canadian government should examine the feasibility of developing a rail bilateral agreement with the U.S. government in order to ensure the free flow of goods between the two countries. PCS Sales proposed that, pending the development of such an agreement, Canadian railways could be granted temporary authority to cancel routes and to surcharge transborder rail traffic. PCS cautioned that the CTC should carefully monitor the impact of such actions.

Finally, PCS Sales contended that the Canadian government should accelerate its review of railway collective pricing (section 279, Railway Act). Pending the outcome of this review, deregulation of transborder rail traffic could serve as a demonstration project in this regard.

D.15 BRUNSWICK MINING AND SMELTING CORP. LTD.

D.15.1 General

Brunswick Smelting is a member of the Noranda Group and Mr. M.J. Buller, who subsequently appeared on behalf of Noranda in Toronto, appeared as Brunswick's witness at the public hearing in Halifax, N.S. It was considered that Brunswick had problems which were unique to its location in the Atlantic region and it was therefore considered appropriate to make its submission in this venue.

Brunswick is a major shipper of lead metals, metal residues, sulphuric acid, silver ore, metallurgical coke, and a variety of chemicals. Mr. Buller's evidence reflected the position of the Noranda Group based on actual experience as it involved traffic moving from Brunswick's facility.

D.15.2 Potential Scope of Staggers Impact

Noranda's position on this subject is covered under submissions made to the public hearing during its sitting in Toronto.

D.15.3 Evidence of Staggers Effects

Mr. Buller gave a number of examples concerning Brunswick's experience in transportation pricing negotiations with Canadian and U.S. carriers in the post-Staggers environment.

The first example involved the movement of lead metal. It was indicated that in 1983, Brunswick Smelting produced 64 000 short tons of lead and 19 600 tons were shipped to the U.S. of which 13 000 tons moved by rail.

In June of 1983, Brunswick initiated negotiations with CN Rail on the possibility of developing rates which would provide more traffic for rail carriers. CN responded in August 1984 with a counter proposal predicated on receiving 100% of the traffic concerned. Brunswick was not prepared to make a commitment of 100% and on that basis, the proposal went forward to CN's interline connector, Conrail. Such rates would be published in open tariffs as joint international rates. Conrail was not prepared to agree to public exposure of the rate level as it considered that this would lead to demands for reductions in rates by other shippers moving similar products. The matter was resolved by CN publishing a proportional rate from Belledune, N.B., to Huntingdon, Quebec and Conrail publishing a confidential rate scale beyond. Brunswick considered it important that its U.S. competitors would be without knowledge as to Brunswick's transportation costs in appropriate markets.

The second example involved shipments of lead metal residues to Baton Rouge, Louisiana. In April of 1982, negotiations were commenced and an acceptable rate level became effective May 2, 1982. Prior to Staggers, such a negotiation period would have taken up to three months due to the rigidity of the rate bureau negotiation ritual.

The third example cited covered movements of coke coming into Brunswick's plant from the United States. During 1984, there has been confusion concerning ambiguity in tariff application in respect of such rates as published in open tariffs. Brunswick considered that the capability of negotiating contract rates with United States lines and Canadian lines would eliminate such problems.

Commission Counsel questioned Mr. Buller on circumstances relating to arrangements entered into with United States and Canadian carriers concerning the movement of lead metal to the United States. As a result of such cross-examination, the following points were established:

1. Prior to the establishment of rates on and off the U.S. border, Brunswick's rail traffic moved on joint international rates published in open tariffs.
2. At the present time, traffic moves on combination rates to and from Huntingdon, Quebec.
3. The rate from Belledune to Huntingdon is published by CN Railways in an open tariff filed with the CTC. The said rate is restricted to apply only on traffic for furtherance by Conrail.
4. The rates from Huntingdon to destinations in the United States existed in a confidential contract executed with Conrail and consisted of a reduced rate scale for the movement of products concerned. This agreement does not contemplate rebates or allowances. Rates in question have subsequently been filed by Conrail with the CTC.
5. Brunswick has entered into rebate contracts with an unnamed American carrier which contemplates allowances on the U.S. portion of existing joint international rates. Such arrangement has not been filed with the CTC.
6. The level of the allowance is based on a formula related to the selling price of the product and is paid to Brunswick by the United States' carrier party to the agreement after the traffic has moved.
7. The freight bill for the movement of traffic concerned is paid to two separate railways, the Canadian carrier and the United States carrier.

D.15.4 Position on Legal Issues

Mr. Buller considered that allowances to Canadian shippers for international transportation within the United States are completely legal, as the jurisdiction of the CTC is within Canada only.

D.15.5 Other Issues Raised

Brunswick endorsed Noranda's position on the question of interswitching.

D.15.6 Recommendations

Brunswick endorsed the same recommendations as contained in Noranda's submission.

D.16 INDUSMIN LIMITED

D.16.1 General

Indusmin Limited officials had contacted the CTC even prior to the initiation of the section 81 Inquiry to express their concern at certain effects of Staggers. Subsequently, they had a discussion with the section 81 Inquiry Officers on these effects.

Mr. R.S. Thomson, Counsel for Indusmin, who testified at the public hearing, directed his remarks towards the impact of Staggers on a single product, silica sand, a commodity mined at quarries in Ontario and Quebec and subsequently crushed for use in the Canadian glass industry. The company's two mines employ 256 people. Competition is primarily located in Illinois where companies are able to excavate sand without the added financial burden of mining rock and subsequently crushing it to produce the same product as is produced by Indusmin. The latter's production cost is higher because of this difference. In spite of higher production costs, Indusmin believed that, were it not for the disadvantage resulting from U.S. rail deregulation, it could remain competitive because it is closer to the marketplace than its competitors.

D.15.2 Potential Scope of Staggers Impact

In referring to the situation since the enactment of Staggers, Mr. Thomson stated that it is the U.S. railroads, not shippers, who are upsetting traditional supplier relationships. "The immense economic powers of these railways is far too great to be confronted by a small manufacturer and producer such as Indusmin." The witness was concerned that with deregulation, there would be nothing to stop the vast American railroad from reducing its transportation charges to a Canadian consumer to such an extent that the traditional Canadian supplier is driven out of business.

D.16.3 Evidence of Staggers Effects

Since Staggers, U.S. railroads have been contacting Indusmin customers with offers of silica sand originating in the U.S. and they have been successful in their efforts. Indusmin presumes that the U.S. product has been moving under confidential rail contracts. Therefore, Mr. Thomson contended, Indusmin, a mining company, is being forced to compete with a railroad and is unable to do so. Furthermore, Indusmin is competing with an American railroad on a commodity produced and sold in Canada. The financial impact of this situation on Indusmin, a relatively small company, will have reached an estimated $3,200,000 by the end of 1985.

Indusmin believed that it was the U.S. railroads that approached their silica customers in Ontario and Quebec and offered them a rebate if they would change to using the sand from Illinois rather than using Indusmin's manufactured sand. While there is still a published tariff which quotes a rate of $29 per ton, Mr. Thomson stated that Indusmin assumed that there is a confidential contract containing a lower rate. Indusmin, therefore, does not have the information required to carry out a realistic assessment of what competition they have to meet. Mr. Thomson contended that their competition is not the mine; their competition is the U.S. railroad.

D.16.4 Position on Legal Issues

The witness stated that sections 3 and 23 of the National Transportation Act provide the Canadian Transport Commission with the jurisdiction to investigate any matter affecting application of the transportation policy and to make orders as it sees fit. Therefore, Indusmin submitted that the Canadian Transport Commission should require contracts pertaining to international traffic to be public information. Section 23, Subsection 4 appears to give the Commission very wide powers to correct matters which prejudicially affect the public interest and where it appears that there may be a situation contemplated by section 3(a) (ii).

Mr. Thomson remarked that rates have to be compensatory in Canada and the CTC has jursidiction over a railway if that railway has lines in Canada or if it has an establishment in Canada. In either case, the CTC can remind the railway in question that it is guilty of predatory pricing.

D.16.5 Other Issues Raised

The material submitted to the Inquiry dealt only with the specific problem being experienced by Indusmin since the enactment of Staggers.

D.16.6 Recommendations of Indusmin Limited

1. Indusmin recommended that the Canadian Transport Commission require that contracts pertaining to Canada-U.S. traffic be filed and made public information so that the real rate would be there to be seen.

2. In reference to the confidential contract and rebating matter, if the CTC agrees that there is a problem the expertise is available to devise a system to ensure that this abuse is checked.

3. Indusmin envisages section 23 as providing the jurisdiction to investigate all of the circumstances of any complaint about rates and he considers that it gives the Commission the jurisdiction to make such orders as it considers proper.

4. If the rates in question were found to be non-compensatory, the CTC might consider something like the excise tax applied in the case of a dumping offence.

D.17 NORANDA SALES CORPORATION

D.17.1 General

Noranda Sales Corporation did not make submissions to the section 81 Inquiry, but Mr. M.G. Buller, Manager of Rail and Truck Transportation for Noranda Sales Corporation, appeared as a witness at the public hearing in Toronto, Ontario. Noranda Sales is the marketing agent for the mining and metallurgical divisions at Noranda Inc. Among other things, it negotiates transportation arrangements on a domestic world-wide basis for:

1. Copper, lead and zinc concentrates
2. Copper, lead and zinc metals
3. Potash and fertilizers
4. Salt cake
5. Residues and slags
6. Chemicals viz. sulphuric acid, copper sulphate, anhydrous ammonia.

In 1983, total transportation cost for North America for such Noranda products was approximately $107 million on approximately three million tons of product. U.S. portion by rail equated to $38 million or 36% and 1.25 million tons or 42%. The U.S. portion involved no U.S. domestic traffic, although the total $107 million did contain components of domestic traffic both Canadian and U.S.

D.17.2 Potential Scope of Staggers Impact

D.17.3 Evidence of Staggers Effects

Noranda's evidence fell into the following categories:

1. Impact on Rate Relationships

Staggers has allowed the issuance of confidential contracts and the filing of such contracts in the U.S. on a confidential basis in respect of movements within the U.S. This affects the position of Canadian suppliers in U.S. markets as they are no longer able to assess their competitive position from a transportation standpoint. Where international rates remain open to the public under Canadian law, U.S. shippers are at an advantage in this respect. Mr. Buller indicated that American customers receive allowances on Canadian traffic that should accrue to Canadian shippers. Some customers dictate routings to Noranda at the expense of the latter. A U.S. consignee served by two or more competing U.S. lines is in a position to negotiate a rebate contract individually with such lines and commit traffic to the carrier or groups of carriers who are prepared to make the greatest monetary concession. This has occurred notwithstanding the fact that Noranda pays the direct freight cost.

2. Impact of U.S. Contracts on Joint International Freight Rates, Under Existing Canadian Law

Mr. Buller stated that in the pre-Staggers era, all carriers able to participate in a specific movement would negotiate collectively with shippers, formulate a rate scale and publish applicable rates and routings in tariffs subsequently filed with the ICC and CTC. In the post-Staggers era rail carriers subject to that act are forbidden to negotiate rates on a collective basis. Carriers must now negotiate individually except where they provide an end to end single route.

Mr. Buller was requested to elaborate on Noranda's position that confidential contracts resulting in rebates to Canadian shippers by U.S. roads for movement in the U.S. are legal, in the context of the example cited in Halifax, N.S. involving traffic destined to the U.S. on combination rates over U.S. border points, such rates having resulted from contractual arrangements with Conrail on the U.S. portion of the movement. Mr. Buller replied that he had since been advised by Company Counsel that such arrangements are confidential in respect of information contained therein. He did consider that so far as transportation involves transportation on U.S. soil, which presumably lies outside Canadian jurisdiction, it would constitute a separate movement on U.S. soil subject only to U.S. law. He was then asked how this affected the qualification concerning doubt that U.S. movements without Canadian involvement could be totally separated. He indicated that in this context he was considering the position of carriers and not shippers in the sense that a Canadian line's U.S. subsidiary can pay higher than normal rebates as a result of adjustments made in revenue share by the Canadian parent in division arrangements. He did admit that such opinion was based on his company's speculation of what is happening in the maketplace.

As a consequence of this, Noranda considered that, within the United States, Canadian shippers have suffered to the extent that their competitors' shipping costs in the U.S. are no longer known to them, that Canadian railways may lose longhaul traffic, but have a certain protective umbrella through U.S. subsidiaries. They considered that the current non-legality of confidential contracts on the Canadian portion of international traffic is detrimental to the interests of Canadian shippers and that changes be made in the Railway Act to give Canadian railways and shippers benefits available to their U.S. counterparts under Staggers. Mr. Buller further stated that such changes should not impinge on any rights currently enjoyed by shippers under section 23 of the National Transportation Act.

3. Effects of Route Cancellations by U.S. Railways on Canadian Shippers. Effects on Canadian Carriers Deprived of Traditional Divisions

Noranda stated that any route cancellations by U.S. roads on their traffic had resulted in cost reductions. They did indicate that Canadian railways should not be able to take any action in this respect without the agreement of shippers. The CTC would act as arbitrator where a concensus could not be reached. When railway counsel pointed out that U.S. carriers are not subject to such constraints, Mr. Buller agreed but felt that the U.S.

position, as modified by Noranda, is seen by them as resulting in a better working relationship.

D.17.4 Position on Legal Issues

Noranda stated that section 208 of Staggers provided the most significant change in allowing carriers and shippers to enter into confidential contracts. He considered that such action conflicted with sections 269, 275, 279, 286, 287, 380 and 381 of the Canadian Railway Act as such sections of the Canadian Act disallow contracts and allow Canadian roads to exchange cost information and establish rates on a collective basis. When questioned, Mr. Buller indicated that such disallowance involved confidential contracts only.

It is Noranda's position that confidential contracts resulting in rebates to Canadian shippers, by U.S. roads, for movements within the United States do not violate Canadian regulations. This premise was qualified to the extent that there was doubt that, in the joint international rate situation, U.S. movements without Canadian involvement could be totally separated.

D.17.5 Other Issues Raised

Noranda considered that interswitching zones presently in effect in Canada were too restricted and recommended that they be extended to increase competition. Such relief would apply on domestic as well as international traffic.

D.17.6 Recommendations

Noranda proposed specific changes to the Canadian regulatory environment to give Canadian railways and shippers the same benefits as are available to their U.S. counterparts under the Staggers Act. Such changes would include:

1. Sections 275, 286 and 289 of the Railway Act should be changed to allow confidential contracts on international traffic. Contracts would be filed with CTC for section 23 purposes only and not open for public or railway inspection.

2. Sections 380 and 381 of the Railway Act should be changed to allow for confidential rebates or allowances on international traffic only and be filed with the CTC only and not be open for public inspection.

3. Canadian railways should only be allowed to cancel routes when the shipper agrees subject to CTC arbitration in the absence of concensus. No changes to be permitted during the period of arbitration.

4. Section 279 of the Railway Act should be changed to disallow collective ratemaking on international traffic.

5. Section 287 of the Railway Act should be modified where it affects the regulation of rates on traffic contemplated by its application.

6. Surcharges contemplated by section 217 of the Staggers Act should not become part of the Canadian regulatory scene. Such action could contribute to excess railway profits and should not be permitted.

7. Interswitching zones should be extended only to increase competition. CTC should ensure that any costs passed on to shippers do not include cost factors already included in line haul revenue.

8. Railway and shippers should be free to contract for mutually acceptable liability limits under the control of the Canadian Transport Commission.

D.18 NOVACOR CHEMICALS

D.18.1 General

Novacor presented written evidence to the public hearing and supplied Mr. D.P. Freeman as a witness for Novacor in Calgary. They did not participate in the final argument at Ottawa. Mr. Freeman, who holds the position of Manager of Transportation for Novacor Chemicals, presented evidence on behalf of the Novacor group which he indicated included:

1. Diamond Shamrock Alberta Gas Ltd.
2. Alberta Gas Ethylene Company Ltd.
3. Novacor Ltd.

Novacor's evidence reflected the concerns of this group as they perceived the effects of changes brought on their operations by Staggers.

D.18.2 Potential Scope of Staggers Impact

The witness stated that his company serves both the Canadian and U.S. markets with a significant portion of its production of 500,000 metric tons finding its way into the U.S. market. His company considered that Staggers has had both positive and negative implications on their ability to penetrate U.S. markets, but on the whole, benefits outweigh disadvantages. For this reason they supported the changes which have flowed from Staggers. They further considered that similar changes in Canadian law would be conducive towards a more competitive rail transportation environment.

D.18.3 Evidence of Staggers Effects

Positive effects of changes flowing from Staggers were perceived to fall into four areas categorized as follows:

1. Ability of U.S. rail carriers to respond to intermodal competition more effectively.

2. The freedom given to U.S. carriers to establish new rates quickly, circumventing the previous lengthy rate bureau proceedings.

3. The introduction of contract agreements incorporating rate reductions and service commitments.

4. The introduction of confidential contracts permitting allowances and rebates with resulting reduction in freight costs to shippers/receivers.

These benefits were seen to accrue chiefly to U.S. shippers and conversely presented difficulties to Canadian shippers competing with their U.S. counterparts in the same market place.

Negative effects were perceived to impact chiefly on the Canadian transportation infrastructure. Such negative effects have resulted from differences now found between Canadian and U.S. legislation which affect joint international traffic and include:

1. Confidentiality of contracts which limits the availability of competitive pricing data to Canadian suppliers whose transportation costs still remain in the public domain.

2. Anti-trust immunity still enjoyed by Canadian carriers frustrates the inherent benefits of the competitive marketplace.

3. Opportunities for U.S. carriers to become more cost efficient through route closures and withdrawal of reciprocal switching results in increased shipping costs.

Novacor endorsed the introduction of confidential contracts in the Canadian transportation environment and suggested that they be filed with the CTC on a strictly confidential basis as between the shipper and the carrier. Mr. Freeman indicated that this proposal merely paralleled his understanding of procedures currently in place in the U.S.A. It is Novacor's belief that the Agreed Charge concept presently utilized in Canada could be used as basis for confidential contract arrangements comparable to the U.S. The witness felt that the only element missing was the confidential aspect. Railway counsel pointed out that the legislative authority for Agreed Charges in Canada, (i.e., the Transport Act), specifically precluded confidentiality and furthermore required carriers to consent on rate proposals on competitive traffic. Mr. Freeman conceded that this was true, but that this suggestion was merely made in the context of formatting such an arrangement on the Canadian scene.

D.18.4 Position on Legal Issues

On the question of participation by Canadian shippers in U.S. confidential contracts constituting violations of Canadian law, Novacor was dubious. They specifically witheld comment on the legality of these contract arrangements. They did, however, express the opinion that the CTC should not become entangled in this issue in any manner which would reduce the ability of Canadian companies to be competitive with U.S. counterparts. They considered that any ruling by the CTC deeming confidential contracts illegal would remove a potential benefit from Canadian shippers. Following questioning from Commission Counsel as to the Commission's lack of discretionary power if presented with a violation of law, Mr. Freeman conceded that the Commission would be required to respond in accordance with its statutory duty.

D.18.5 Other Issues Raised

Novacor believed that interswitching limits in Canada should be increased to provide greater competitive access to shippers served by one rail carrier only. They also considered that any initiatives undertaken to increase competition on international traffic should have equal application on the domestic scene.

D.18.6 Recommendations

Novacor made the following recommendations:

1. Canadian railways should be permitted to engage in confidential contracts on international traffic and allowances and rebates should be paid on such traffic.

2. Competition should be increased for shippers captive to one carrier by the extension of interswitching limits.

3. Existing rates and routes should be retained during a transitional period, permitting route adjustments to increase efficiency as opposed to enhancing carrier revenues.

4. Section 279 of the Railway Act should be amended to remove anti-combine immunity from railway pricing.

5. Legal status for confidential contracts offered by U.S. railways should be established under Canadian law.

D.19 SAINT JOHN PORT DEVELOPMENT COMMISSION

D.19.1 General

The Saint John Port Development Commission, an organization affiliated with the City of Saint John and constituted to encourage the use of port facilities located at Saint John, presented written and oral evidence by Mr. Hugh McLellan, Chairman of the Port Commission, to the Inquiry in Halifax. Mr. McLellan's basic concern was the competitiveness of the Port of Saint John and factors, such as Staggers, which have impacted upon such competition.

D.19.2 Potential Scope of Staggers Impact

One of the basic thrusts of Mr. McLellan's testimony concerned the competitiveness of Canadian ports with their U.S. counterparts. He was under the impression that certain traffic was being diverted away from Canadian ports as a result of U.S. deregulation of both rail and truck and cited examples of truck movements of cargoes from central Canada to the Port of New York for export. An example was also cited of traffic ex the West Coast moving through Seattle (rather than Vancouver) to Winnipeg which he related, at least partially, to the ability of U.S. roads to negotiate confidential contracts, but the witness stated that he had no first-hand knowledge of this situation.

The witness discussed the balance/imbalance of container traffic moving via Canadian East and West Coast ports as compared to that moving in the U.S. ports.

Mr. McLellan further stated that with the ability to enter into confidential contracts, Saint John should be "...able to more effectively compete with American railways and inland shippers".

He also stated that if CP is able to offer rebates from Saint John through Maine to Montréal, the Port of Saint John would benefit and it is vital to the Port of Saint John and the economy of New Brunswick that Canadian Pacific continue to be able to maintain its share of the Maine and New England overhead market through the cargo it picks up on its line through Maine.

Mr. McLellan was particularly concerned about the continued viability of CP's service to Saint John.

D.19.3 Evidence of Staggers Effects

No direct evidence was presented pertaining to the effects of Staggers on the Port of Saint John. When questioned, the witness expressed concern but was unable to provide any examples of diversion or loss of traffic either actual or potential by this Port.

D.19.4 Position on Legal Issues

The evidence dealt with no legal questions other than the issue of Port Parity which, although being beyond the scope of this inquiry, is discussed briefly in the next section.

D.19.5 Other Issues Raised

The other major concern raised by Mr. McLellan was that of rate parity with the Port of Halifax. He could not indicate any statutory requirement for port parity other than a reference to a regulatory decision in the "30s" and a concern that if, under the present regime, CP lowered its rates from Saint John, CN would match these from Halifax.

D.19.6 Recommendations of the Saint John Port Development Commission

1. Canadian railways must be forced to compete with each other.

2. Concern was expressed regarding multi-modal ownership by the railways.

3. A general lessening of regulation was called for in motor vehicle as well as rail.

4. Rail rates should be substantially deregulated for all Canadian domestic and international traffic.

5. Section 279 of the Railway Act should be subject to the Combines Investigation Act.

6. Rates should not be subsidized to favour particular regions of Canada without express parliamentary approval.

D.20 HALIFAX-DARTMOUTH PORT DEVELOPMENT COMMISSION

D.20.1 General

The Halifax-Dartmouth Port Commission (Halifax-Dartmouth) presented evidence at the public hearing through Captain Jack Bathurst, Vice-Chairman of the Commission. Halifax-Dartmouth was established by the Nova Scotia Provincial Government and includes, as members, representatives of the municipalities of Halifax, Dartmouth, Bedford, and the county of Halifax. It is primarily concerned with the development of the Port of Halifax as a gateway port and the transport services, facilities and operations which affect the "via Halifax" route.

D.20.2 Potential Scope of Staggers Impact

Halifax-Dartmouth presented no evidence to show any potential effects of Staggers although reference was made to the fact that if Canada does not respond in a like manner to U.S. deregulation, then there will be a loss of traffic to the U.S. ports.

D.20.3 Evidence of Staggers Effects

No evidence was presented on this subject.

D.20.4 Position on Legal Issues

With respect to section 279 of the Railway Act and the ability of the railways to meet and agree upon common rates, the witness stated that there cannot be both a monopolistic rail situation and deregulation. There must be competition with deregulation.

D.20.5 Other Issues Raised

The Halifax-Dartmouth presentation dealt mainly with the shipping (e.g., water carriage) industry, the changes forthcoming in the structure of this industry and the resulting changes this will bring about for ports, especially the competitive position of Halifax vis-à-vis U.S. east coast ports and St. Lawrence River ports, particularly Montréal. Captain Bathurst stated that Halifax would have a natural advantage of becoming eastern Canada's only load centre, since the St. Lawrence channel is too shallow and Saint John has such high tides and is too far off the shipping lanes. This advantage could be jeopardized by the monopolistic rail service currently available to Halifax. Halifax-Dartmouth, therefore, favoured confidential contract rates in order for the load centre to compete with U.S. ports, but only in the context of having access to competitive rail service via CP running rights to Halifax or by an alternative container train company being established and provided with somewhat similar operating arrangements as currently exist between VIA Rail and CN/CP. Captain Bathurst was concerned with the availability of deregulation as it would impact on overseas trade and not on transborder trade.

D.20.6 Recommendations of the Halifax-Dartmouth Port Development Commission

Halifax-Dartmouth stated that deregulation must be looked at from the point of view of transborder movements and overseas routes and it must also be reviewed so as to include consideration of:

1. The artificial economic distortion between modes as a result of free dredging and icebreaking on the St. Lawrence versus published compensatory rail rates applied to through rates via Halifax.
2. Halifax being the only major Canadian port serving the liner trades that is served by only one railway.
3. Halifax is the only eastern Canadian port that has the potential to develop as a load centre port for the third generation container ships.

D.21 HALIFAX BOARD OF TRADE

D.21.1 General

The Halifax Board of Trade is a voluntary organization with over 3100 members, mostly from the business community. The Board provided as a witness at the public hearing, Mr. John Landry. The primary concern of the Board of Trade in transportation matters was with those aspects of National Transportation Policy which may affect the Port of Halifax. Support was expressed for the position adopted by the Halifax-Dartmouth Port Development Commission.

D.21.2 Potential Scope of Staggers Impact

The Board of Trade presented no evidence to show any actual or potential harm or benefit as a result of *Staggers*.

D.21.3 Evidence of Staggers Effects

No evidence was presented on this subject.

D.21.4 Position on Legal Issues

Concern was expressed in the area of tariff publishing requirements.

D.21.5 Other Issues Raised

The Board of Trade expressed concern regarding the future competitiveness of Halifax as a gateway port as Halifax is dependent upon a multimodal (ship-rail) transport system which must remain competitive with other multimodal systems using East Coast ports. The witness also expressed concern about the Port's ability to establish itself as the Canadian port of call for the new third generation container vessels.

D.21.6 Recommendations of the Halifax Board of Trade

The Board of Trade supported any changes that are required to enable Canadian overland transport to compete with U.S. overland transport. Should the Canadian Transport Commission deem certain changes to be recommendable to the Minister, such amendments must take account of the unique vulnerability of the Port of Halifax.

D.22 THE BOARD OF TRADE OF METROPOLITAN TORONTO

D.22.1 General

The Board of Trade of Metropolitan Toronto is a business organization having a roster of some sixteen thousand members representing such diverse sectors as manufacturing, transportation and commerce. On September 30, 1983 The Board of Trade of Metropolitan Toronto met with section 81 Inquiry Officers for initial discussions on the effects of U.S. rail deregulation. Mr. J. Ernest Magee, Vice Chairman, Distribution Committee, appeared as a witness for the Board at the public hearing. In his introductory remarks, Mr. Magee stated that in the view of the Board, the recent U.S. rail legislation (Staggers) results in Canada being disadvantaged relative to its respective U.S. competitors. He added that it is important that careful scrutiny and remedial action occur.

D.22.2 Potential Scope of Staggers Impact

The witness stated that 70% of Canada's international trade is with the U.S. and that a series of GATT rounds has resulted in a succession of tariff reductions between the two countries. Consequently, it is estimated that by 1988, eight percent of Canada's trade with the U.S. will be duty free, while ninety-five percent will be subjected to duties of 5 percent or less. Mr. Magee affirmed, therefore, that in order to be competitive, Canada must match or better its competitors in every aspect of product cost, including transportation. It is the opinion of the Board that to help accomplish this, railways should move toward independent action in competition, Canada cannot limit itself to doing what the railways think is best for them, nor to what some may think is best for a particular shipper group. Canada must face the reality of international competition and the impact it is having directly and indirectly on the Canadian economy.

It was the belief of the Board that it is unlikely that the U.S. will grant anti-trust immunity to Canadian railways as doing so would foul the basis of the trend, in the United States, towards deregulation and competition which came about as a result of Staggers.

D.22.3 Evidence of Staggers Effects

The witness made the point that Staggers has enabled U.S. railroads to engage in confidential contracts with shippers so that one railroad has no knowledge of another railroad's freight charges. It not being lawful for Canadian railways to act similarly, U.S. carriers possess knowledge of Canadian rates and charges but Canadian railways do not have access to knowledge of U.S. rates and charges. This comprises a distinct disadvantage for Canadian railways vis-à-vis U.S. railroads and weakens the ability of Canadian manufacturers to compete in the U.S. market because their transportation costs are known to competitive U.S. manufacturers. This negative effect on Canadian manufacturers may be somewhat offset if the Canadian manufacturers become party to the confidential contract covering the U.S. portion of an international haul; doing so may result in short-hauling a Canadian railways with little effective recourse remaining to the latter.

The Board contended that this issue is further complicated by the uncertainty regarding the legality of Canadian manufacturers engaging in confidential agreements with U.S. carriers.

D.22.4 Position on Legal Issues

The Board stated that it would appear that Staggers has had a direct impact on Canada as it is so much at variance with Canadian legislation, particularly section 279 of the Railway Act.

It was stated as their understanding that some Canadian companies had not participated in confidential contracts because of uncertainty with respect to their legality. At that time, generally speaking, their members were uncertain of the legality of their actions in relation to U.S. rail deregulation.

The Board was not of the opinion that section 279 of the Railway Act should be repealed, at least insofar as it applies to international traffic. The CTC could, however, direct the Canadian railroads to act independently when international traffic is involved. It was the Board's belief that collective rate-making tends to produce higher rates which can no longer be afforded considering the effect of Staggers.

D.22.5 Other Issues Raised

The only other issue raised by the witness pertained to interswitching and the extension of the four-mile limit.

D.22.6 Recommendations of the Board of Trade of Metropolitan Toronto

It was stated that the four-mile limit must be addressed as part of effectively providing competitive access for Canadians between Canada and the United States.

The Board recommended that Canadian shippers and receivers be placed on a substantially equal footing with their U.S. competitors and because it is unlikely that the U.S. will change their legislation, it follows that Canada's only option is a change in legislation, with respect to international movements. What this change in legislation would mean is that Canadian railways could price independently and could file confidential contracts with the Canadian Transport Commission. The content of the confidential contracts should not be disclosed to a non-participating railway or shipper. Such a legislative change would also mean that Canadian railways which are currently disadvantaged on overhead traffic because the related rates are public information (whereas U.S. overhead movements can be kept confidential) would not be disadvantaged by Canadian railway status.

Concerning route closures, the Board urges dialogue between the CTC and the ICC to discourage route closing when used as an anti-competitive or retaliatory measure.

In reference to railway liability for loss and damage, the Board stated that the current applicable general orders should continue. If, however, both the railway and shipper/receiver mutually agree to limit the liability, this would be acceptable to the Board.

D.23 LES ENTREPRISES FERROVIAIRES CFFPC DU CANADA INC.

At the public hearing, Mr. Gilles Legault read a prepared statement on behalf of this organization. The Statement included the following recommendations: 1) Canadian railways should be allowed to establish road-competitive tariffs; 2) Railways should be allowed to set rates at whatever levels they wished; 3) The Minister of Transport should de-regulate the railways in Canada as rapidly as had been done with airlines. He also stated that Canadian shippers which use U.S. railways for long-hauls could lead to losses on Canadian lines, and to applications for abandonment and to subsequent increases in unemployment in Canada.

D.24 CONSUMER AND CORPORATE AFFAIRS CANADA

D.24.1 General

Evidence was presented by four Consumer and Corporate Affairs (CCA) witnesses, and the department's position was outlined by CCA counsel, Mr. Miller, in his final argument.

The C.C.A. position was advanced by Mr. Clive Barton, Manager of Transportation Policy Analysis for R.L. Banks and Associates Inc. of Washington, D.C. and information relevant to that position was supplied to the public hearing by Messrs. Ludwick, McCaffrey and Rich. This summary, therefore, consists firstly of Mr. Barton's evidence, followed by that of Messrs. Ludwick, McCaffrey and Rich respectively.

D.24.2 Potential Scope of Staggers Impact

According to CCA, the revised U.S. railway regulatory regime, characterized as Staggers, is leading to a more competitive Canadian railway system. The objective of Staggers was presented as assistance to the U.S. railway industry towards achievement of financial stability through the replacement of economic regulation with competition. CCA concluded that, while there are instances of dissatisfaction with Staggers in the U.S., it is generally considered to be a success. Although imperfections are acknowledged, reversals of the general Staggers thrust are most unlikely.

CCA contended that confidential U.S. contract rates put Canadian railways at a disadvantage, but that the U.S. is unlikely to adjust its system on that account. If any accommodation is to be made, it will have to be by Canada. Changes, in the direction of increased competition, are necessary if joint international through rates are to be revived. Parity in transborder rates is no longer a workable principle. It cannot be enforced at present, and the U.S. is unlikely to reverse box car deregulation.

In CCA's view, joint route cancellations and gateway closings constitute a major problem. A flurry of carrier actions closing international interchanges is anticipated. The effect of these efforts by each carrier to preserve his long haul routing will lead to circuitous routings and inefficiency. However, the Canadian railways are seen as having defenses against such actions of their U.S. competitors. In particular, they can renegotiate divisions and have their U.S. subsidiaries enter into secret contracts.

Although he expressed the opinion that Canada was still suffering a net loss, Mr. Barton pointed to countervailing benefits to Canadian shippers that reduced (in part) Staggers-induced losses to Canadian railways to a transfer of income within Canada. He expressed the opinion that Canadian railways should do well in a transborder competitive environment, and suggested, using the example of Burlington Northern in Vancouver, that they were not doing badly at present. In general, CCA's position was that U.S. railway deregulation will prove beneficial to Canada, particularly if Canada adapts its regulatory regime to complement that of the U.S.

D.24.3 Evidence of Staggers Effects

CCA testified that the Canadian railways are suffering less from U.S. competition than they contend, and that their claims of monetary loss have not been proven. Figures for gross revenue reductions due to diversion are believed to overstate the impact as they do not take into account cost. It was suggested that CN and CP might be using their U.S. subsidiaries to prevent and recover lost traffic. In CCA's opinion, their performance over the last 10 months indicated that the Canadian railways have been able to react to a competitive environment in a constructive manner. It was also seen as indicating that there is no need for the railways to collude over transborder rates.

The Ludwick survey (following) was cited as indicating that, generally, Canadian rail users see positive results from Staggers, and that most Canadian shippers view the U.S. regulatory regime as an incentive to make welcome changes in Canadian regulation.

D.24.4 Position on Legal Issues

In CCA's opinion, to avoid U.S. antitrust action against Canadian Railways pursuant to the Sherman Act, the CTC should exercise its authority, under section 279 of the Railway Act, to restrict collective ratemaking, on transborder movements, to participating direct connectors.

CCA counsel, noting the division between shippers and the railways on the feasibility of attaining parity of transborder rates, submitted that parity is no longer a workable principle, and the basis for creating and enforcing a system of transborder parity no longer exists.

D.24.5 Recommendations

C.C.A. made the following recommendations:

a) Transborder railway traffic should not be totally deregulated.

b) A piecemeal approach should not be taken to changes in Canadian legislation. The CTC should take a proactive approach to the needed consistent pro-competition package.

c) The changes suggested by the railways should be implemented, but minus impediments to heightened competition.

d) Canadian regulation of transborder rates should rely primarily on competition. Canadian railways should be placed on the same footing as their U.S. competitors.

e) Confidential contracts should be encouraged.

f) Sections 275 and 380 of the Railway Act should be amended to permit secret rebates on transborder traffic. Summaries would be filed with the CTC and statistical reports would be published.

g) Rates on overhead movements would no longer need to be filed with the CTC.

h) The CTC should restrict collective ratemaking on transborder rates to participating direct connectors. Canadian railways should not have anti-trust relief, or be treated as a single railway in the U.S.

i) Shipper captivity should be eliminated through a policy of easier entry that includes provision for:

    i) mandatory running rights

    ii) expanded interswitching

    iii) easier new entrant access, to include encouragement of short lines (see appendix B) and the transborder entry of U.S. railroads.

j) New procedures, that would include binding arbitration on issues of surcharging and route cancellation, to complement section 23 of the National Transportation Act, should be introduced. The burden of proof would be on the railways.

k) General Orders T-5 and T-6 should be amended to permit the unregulated negotiation of railway liability arrangements.

E.M. LUDWICK (CONSUMER AND CORPORATE AFFAIRS CANADA)

1. General

Mr. Ludwick's research was conducted for Consumer and Corporate Affairs as a contribution by that department to a review of current legislation -- specifically section 279 of the Railway Act and section 32(2) of the Transport Act -- presumed to be the bases for collective railway pricing in Canada. A concensus was achieved as to what aspects of Ludwicks report were relevant to this inquiry; this summary focuses on those aspects.

2. Scope of Staggers' Impact

Mr. Ludwick reported having surveyed, from an estimated population of 3,318 Canadian domiciled shippers, a 282 respondent sample, randomly selected from CP and CN customer lists, and stratified to achieve regional, shipper size and shipper type balance. He reported respondent gross revenues at $122 billion, and total transportation and railway transportation costs at $5.5 and $3.8 billion respectively. Of this, $1.7 billion was spent on transborder railway transport. Survey responses indicated that 24% of the 282 firms had contracts with U.S. railroads filed with the ICC, and that 30% of the surveyed transborder freight moves at rates governed by these contracts.

In terms of shipper attitudes to the Canadian regime, Mr. Ludwick's Survey indicated overwhelming opposition to full Canadian railway deregulation. However, among survey respondents, 54% expressed dissatisfaction with the Canadian collective ratemaking status quo, and see increased interrailway competition as beneficial. Mr. Ludwick concluded from his survey that if more competitive ratemaking was introduced in Canada, railways should remain responsible for publishing rates, and continue to be subject to National Transportation Act section 23 rate appeals, common carrier obligation, interswitching at no extra charge and captive shipper rate prescriptions.

Mr. Ludwick concluded that Canadian shippers generally believed that the new U.S. regulatory regime is beneficial. Of the surveyed firms with transborder shipping, 40% claimed rate improvements, while only 11% believed they would have been paying less under the old U.S. regime. Those who believed railway efficiency and productivity had improved, and those who believed innovation and responsiveness to shippers had improved, exceeded those believing it had deteriorated by four to one. More transborder shippers believed their competitive position had improved than the reverse, and there was vague evidence of improvements in equipment availability and the speed of quoting rates. On the other hand, 29% reported increased negotiating time and expense, against 15% reporting a reduction, and some deterioration in the availability of through rates and routing alternatives and in railway liability is suggested. In general, the shippers perceived that prohibiting collective ratemaking in Canada would have similar effects to those they are experiencing under Staggers.

The survey focused on agreed charges as the closest parallel to U.S. confidential contract rates, the salient differences being the Canadian provisions for free shipper access and publication. Among firms surveyed, 52.5% favoured a change in Canadian practice whereby agreed charges terms would be negotiated independently. It was also reported that these firms represented 56.2% of rail costs, 59.4% of transport costs, and 70.0% of gross revenues.

The survey report presents figures showing that 55% of surveyed Canadian shippers with significant transborder railway traffic favour collective ratemaking for transborder rates, and that 68% of them favour publication of transborder rates. Mr. Ludwick expressed his opinion that many of the survey's respondents had mixed feelings towards deregulation, that some were uncertain, others had had favourable experiences with the U.S. regulatory regime in one part of the country and unfavourable ones in another.

SHORT LINE RAILROADS (CONSUMER AND CORPORATE AFFAIRS CANADA)

Mr. R.L. McCaffrey and Mr. W.G. Rich

1. General

The Consumer and Corporate Affairs witness concerned with the short line topic were Mr. R.L. McCaffrey, a U.S. attorney specializing in short line railroads, and Mr. W.G. Rich, President of Delaware Otsego Corporation, a prosperous short line system. They were introduced by Mr. Miller, and questioned briefly by Mr. Wetston and the Chairman.

2. Effect of Staggers on U.S. Short Lines

Short lines handle 3% of U.S. railway traffic, of which 85% is interlined. There are 400 Class III railroads in the U.S., with Class III defined as a railroad with revenues of less than $10 million or a terminal railroad. The Delaware Otsego, presented in the evidence as a short line, has revenues somewhat above the Class III limit. The ICC applies no fitness, capitalization or ability criteria to short line applications. It only requires assurances that the funds required to purchase the property are or will be available, and that the line will be operated for at least two years. When a short line is formed out of an abandonment by a trunk carrier, public capital subsidy is common; as are shipper group support and long term contracts with local shippers to enable financing. However, public operating subsidies are rare.

Mr. Rich testified that deregulation has posed problems for short lines who relied on previous rate and route relationships, but that his line was doing well due to its connection with two competitive trunk railroads. Mr. Rich reported that short lines connecting to a single trunk carrier were less fortunate, and mentioned his understanding that Congress may legislate trackage rights for such short lines. He credited the deregulated U.S. railroads' ability to react quickly to the market as the most important reason for his railroad's traffic gains. He attributed the conversion of a bankrupt railroad and some unsuccessful branchlines into a profitable enterprise (Delaware Otsego) to its competitive position and to aggressive retail marketing that is only possible with a small local enterprise. As well as competition (for divisions) with the connecting trunklines, short lines must compete with trucking and intermodal shipment. He cited the inability of his line to compete with CN and CP originating lumber that is trucked from railheads on the Canadian side of the border.

3. Effect of Staggers on U.S. Short Line Shippers

Mr. Rich testified that shippers located on U.S. short lines, with access to competitive trunk lines, benefited from the availability of competition. He also noted that *Staggers* enabled engagement in more aggressive competition with trucking. Mentioned particularly were rebates to receivers of prepaid freight for insisting on delivery by rail. Rich testified that rate confidentiality did not assist the railroads in competing with truckers, because a shipper could not be forced to keep a rate quote confidential. Shippers will announce a negotiated rate to potential competitors, inviting them to undercut it.

4. Relevance to Canada

Addressing relevance, of U.S. experience with short lines under deregulation, to Canada, Mr. McCaffrey suggested that short lines could prove an alternative to branch-line abandonment. Short lines could market railway transport better locally and operate the branches at lower cost. He stated that there was much Canada could gain by careful experimentation with new entry, particularly where the new short line would have access to both the CN and the CP systems, and where lower cost could be achieved.

D.25 NOVA SCOTIA DEPARTMENT OF TRANSPORTATION

D.25.1 General

The Nova Scotia Department of Transportation (Nova Scotia) was represented at the hearing by Donald L. Stonehouse, Assistant Director of Transportation Policy.

D.25.2 Potential Scope of Staggers Impact

No evidence was presented to show any potential effects of *Staggers*.

D.25.3 Evidence of Staggers Effects

Mr. Stonehouse, in reading the text, stated that *Staggers* seems to have affected Canadian shippers in two ways.

1. It has made it much more difficult for Canadian exporters to determine the transportation cost of their U.S. competitors, and

2. It has lowered the transportation cost for those Canadian shippers who are now receiving rebates from U.S. railroads.

The witness commented on the problems being encountered by the Canadian railways resulting from the loss of overhead (U.S.-U.S.) traffic and the loss of long haul traffic routings to U.S. railroads as a result of the elimination of routings by U.S. carriers and from the provision of rebates in the U.S. Nova Scotia, while in favour of the lowering of transportation costs to Canadian shippers, was concerned that overall railway revenues must be adequate.

D.25.4 Positions on Legal Issues

Nova Scotia did not present any concerns regarding collective rate making on section 279 of the *Railway Act* but did state that if contracts between a railway and a shipper were available to other Canadian railways, it might be very difficult to keep such contracts confidential from railways in the United States.

D.25.5 Other Issues

Nova Scotia was concerned over running rights should there be some form of deregulation and its effect on Halifax, as it is served by only one railway.

D.25.6 Recommendations of the Nova Scotia Department of Transportation

Nova Scotia was in favour of compensatory confidential contracts and rebates on overhead traffic. It was concerned about similar provisions applying on trans-border moves (Canada-U.S. and U.S.-Canada) because locations served by two railways would have an advantage over locations served by one railway. Nova Scotia was opposed to similar provisions being offered for rail movements within Canada

It was recommended that as route cancellations and surcharges could be a negotiating tool for Canadian railways, while not becoming a disadvantage to shippers, there should be a requirement that the CTC hear these cases and present a decision in an expeditious manner.

In the matter of route cancellations, Nova Scotia did not see any apparent advantage to Canadian shippers should Canadian railways be given the authority to cancel routes and surcharge joint international traffic.

D.26 PROVINCE OF ALBERTA

D.26.1 General

The Province of Alberta made submissions to the section 81 Inquiry, presented written and oral evidence at the public hearing through the testimony of Messrs. J.R. Soulsby, Transportation Services Branch of Alberta Economic Development and R.C. Bassett, Senior Director, Transportation, Economics and Analysis for the Province of Alberta in Calgary. The witnesses expressed concern that the best interests of Alberta's shippers be served.

D.26.2 Potential Scope of Staggers Impact

Mr. Bassett stated that the passage of *Staggers* created opportunities for shippers which could have negative or positive impacts depending on such variables as shipper size, proximity to the Canada/U.S. border and availability of competition in the carrier environment. The province's submission in 1983 to the Inquiry, based on discussions held at that time with shippers in the coal, sulphur, petroleum, fertilizer, chemical, forest products, and agriculture industries, emphasized four points as follows.

1. Most shippers had benefitted from increased rate competition;
2. Shippers captive to one railway subject to relatively long Canadian hauls found their competitive position eroded;
3. Confidential Contracts and freight rate allowances made it more difficult for shippers to determine their competitiveness in U.S. markets vis-à-vis U.S. shippers; and
4. On the whole most shippers were opposed to major changes in Canadian regulations.

Subsequently, shippers were re-surveyed prior to the hearing.

Most shippers who had experienced benefits from increased rail competition felt that current vagaries inherent in present Canadian legislation concerning the legality of their interface with American carriers on confidential contracts impeded opportunities to utilize this pricing mechanism to its fullest extent. Consequently, such shippers had abandoned their opposition to changes in Canadian law to place it on a parallel with U.S. legislation.

D.26.3 Evidence of Staggers Effects

Mr. Bassett stated that Alberta industry is heavily dependent on rail transportation to move its goods over long distances to U.S. markets. Certain benefits have been gained by American producers, and, to a lesser extent, by Alberta producers in the post-*Staggers* environment. The province supports changes in Canadian law as it relates to international rail movements, subject to a "sunset clause", a comprehensive review process and effective regulatory protection.

Variations in Competitiveness of Alberta Shippers

The majority of shippers interviewed by Alberta officials indicated that they had benefited from U.S. deregulation. Benefits included reductions in rail rates, access to new markets, and the retention of existing markets. It was acknowledged that smaller and/or captive shippers faced possible disadvantages if faced with loss of collective pricing and on confidential contracts by Canadian Rail Carriers. Such concerns would, however, have to give way to benefits which might accrue to other shipper interests. Questioning by Commission Counsel determined that smaller shippers would include parties with annual transportation bills of less than $100,000. Such shippers should, however, be provided with legislative protection of a less costly and time consuming nature than is currently provided by section 23 of the N.T.A. Protection could also be provided by rate arbitration by Commission Staff.

Impact of Rate Confidentiality

Support for rate confidentiality would hinge on four considerations:

(a) A sunset clause would be included in enabling legislation to reassess the issue within two to three years.

(b) Full disclosure would be made to C.T.C. only. Access to such information restricted to participating shipper and carriers.

(c) C.T.C. to provide periodic recommendation to Minister of Transport on impact of confidentiality on shippers, geographic regions and industry sectors.

(d) Shippers have access to effect remedial regulatory provisions to protect against injury as a result of carrier actions.

Mr. Bassett stated that he would envisage such action as described in (d) as being discharged by the C.T.C. via some form of arbitration procedure. Mr. Soulsby indicated that in a proceeding involving confidential contracts it would have to be an in-camera hearing or review. While it was conceded that certain room for manoeuvrability existed in the informal prehearing stages with respect to section 23 of the National Transportation Act, positions tended to become less flexible when the adversarial stage is reached. Mr. Bassett stated that arbitration would ideally be carried out by a neutral third party with authority to make decisions binding on all parties.

Response to Railway Proposals

1. Canadian railways should be permitted to negotiate confidential contracts on international traffic. However, information contained in such agreements should not be made available to other railways.
2. The Alberta Government shared concerns expressed by Canadian Railways in respect to the extraterritorial reach of U.S. anti-trust laws. They did not consider that such concern would support the railways' proposal that they retain the ability to share and exchange information on international rail freight traffic. Such ability should not be granted to competing Canadian carriers not parties to specific contracts.
3. The Alberta Government did not support the proposal that Canadian Railways should be permitted freedom to arbitrarily cancel routes or surcharge rates on joint international traffic.
4. C.T.C. jurisdiction in respect to pricing on overhead traffic as contemplated by section 287 of the Railway Act should be removed.
5. The Alberta Government would support the proposal that Canadian carriers should have the freedom to negotiate limitations of liability on international movements but not to the extent of third party liability.

D.26.5 Other Issues

Three issues were raised as distinct from the specific terms of reference. Alberta considers interswitching and collective pricing to be elements relating to competition between railways which might impinge on changes in Canadian legislation relating to international rates. They also felt that any change in the international environment might affect the Canadian domestic scene. Again, no specific examples were cited.

D.26.6 Recommendations

The Alberta submission made five basic recommendations as follows:

1. Canadian railways be permitted to establish confidential contracts with shippers on international traffic. Such contracts should be filed with the C.T.C. and not be made accessible to other than participating shippers and carriers involved.
2. Canadian Government should reaffirm its concern with the possible extraterritorial reach of U.S. anti-trust laws.

3. Canadian railways should not be given the authority to cancel routes or to surcharge rates on joint international traffic.

4. Rail movements between points in the U.S.A. which may pass over rail lines in Canada should be removed from Canadian rate jurisdiction.

5. Canadian railways should be permitted to negotiate specific limitations of liability with shippers, free from C.T.C. Approval, except in the area of third party liability.

D.27 PROVINCE OF ONTARIO, MINISTRY OF TRANSPORTATION AND COMMUNICATIONS

D.27.1 General

The Province of Ontario provided a written submission only to the inquiry stating their concern for the potential impact of U.S. deregulation on Ontario shippers and rail carriers. They were not able to provide any conclusive evidence of the impact to date and stated that Staggers had not been in effect long enough to permit a meaningful analysis to be carried out by the Province. In fact, it was their experience that during the period that *Staggers* has been in effect, shippers and industry group views have changed in some cases with respect to the effects of the Act.

D.28 GOUVERNEMENT DU QUÉBEC, MINISTÈRE DES TRANSPORTS

D.28.1 General

The Province of Quebec made written submission only to the inquiry expressing their concern that Canadian rail carriers should not be penalized by U.S. rail deregulation.

D.28.2 Potential Scope of Staggers Impact

In their submission, the Province stated that the diversion of overhead traffic through Canada by American carriers could have the potential to threaten the profitability of certain carriers operating via Quebec. The viability of many railway subdivisions could also be adversely affected by the use of most of the Quebec railway system as a branchline for overhead traffic.

Concern was expressed for the enforcement of section 279 of the Railway Act with respect to the application in Canada of such U.S. legislation as the Sherman Act.

D.28.3 Recommendations of the Province of Quebec

The Province stated that jurisdiction for overhead traffic should be removed from the CTC to allow competition between Canadian and American carriers.

With respect to the issue of route cancellation and rate surcharges, the Province recommended that the CTC carefully examine the economic impact of such actions on carriers and captive shippers in particular.

Canadian carriers should be able to conclude agreements with Canadian shippers to be filed with the CTC and accessible only to Canadian rail carriers in conformity with section 279 of the Railway Act.

It was stated that care must be exercised in the negotiation of confidential contract rates in Canada in view of the economic disadvantage for small shippers who have less bargaining power than larger shippers. The CTC should, however, make a decision on the validity of contract rates and rebates and U.S. carrier should be required to file rates for the Canadian portion of their routes with the Commission in conformity with sections 286 and 287 of the Railway Act.

With respect to the issue of limitation of liability, it was recommended that Canadian rail carriers be permitted to negotiate with shippers limitations of liability similar to U.S. limitations.

D.29 PROVINCE OF SASKATCHEWAN, MINISTER OF HIGHWAYS AND TRANSPORTATION

D.29.1 General

The Province of Saskatchewan presented only a written submission to the inquiry. It stated that Saskatchewan relies heavily on rail transportation and the success of its economy depends greatly on access to international markets for primary and resource products. In 1982, they stated, 45% of the province's Gross Domestic Product was exported. In order to remain competitive, therefore, reasonable rail rates are a necessity and any change to transportation law, policy or regulations is of very great concern to the province. In the view of the province, actions should be taken to retain and expand trade with the U.S.

D.29.2 Potential Scope of Staggers Impact

The province stated that one of the results of U.S. deregulation was lowered rates for Canadian shippers which allowed them to penetrate previously inaccessible markets. Another result was the inability of Canadian rail carriers to compete with their U.S. counterparts due to the incompatibility of Canadian and U.S. law. Confidentiality of U.S. rates places Canadian carriers at a disadvantage to U.S. ones. With the introduction of confidential contracts, rate parity between Canadian and U.S. producers (of e.g., woodpulp) has become impossible.

D.29.3 Position on Legal Issues

The province stated that as Staggers is subject to several court proceedings in the U.S., any immediate changes to Canadian law may become redundant. The preliminary CTC staff report concluded that evidence had not been provided which would necessitate any changes to Canadian law. The province, however, disagreed with this conclusion based on the inconsistency between the U.S. and Canadian laws, the competitive disadvantage faced by Canadian rail carriers and the importance of cross-border traffic to Canada.

Concerning anti-trust immunity, it was stated that should the I.C.C. grant immunity to CN and CP on joint international movements, the Canadian carriers would be precluded from acting independently and competitively in future. If confidential contract rates were required to be filed with the CTC, there would be no requirement for the ICC to grant anti-trust immunity to Canadian railways.

Route cancellations and surcharges, it was stated, would have a detrimental effect on Canadian shippers. Confidential contracts, as proposed by CITL and CMA, and an amendment to section 279 of the Railway Act to make it mandatory to price international traffic more independently, would be a more positive approach. These contracts, according to the province, should be filed with the CTC but should not be made available to other Canadian rail carriers as that, it was stated, would deter intra-modal competition.

Should the province's position on confidential contract rates be adopted, problems such as discovery and compliance difficulty with Canadian law would be eliminated.

With respect to limitation of liability, the province stated that there should be conformity between Canadian and American railways.

It was stated that the lost revenue reported by Canadian railways resulted from Canadian carriers not being able to respond to U.S. carriers' competitive actions, due to lack of conformity between Canadian and U.S. transport laws.

D.29.4 Recommendations of the Province of Saskatchewan

The province made the following recommendations:

1. Canadian law should be changed to allow confidential contract rates which should be filed with the CTC;
2. Interswitching should be used to increase intra-modal competition;
3. Changes should be made to Canadian law to disallow the exchange of cost information and the setting of common rates for international traffic which would eliminate the requirement for anti-trust immunity;
4. Overhead traffic through Canada should not be subject to the CTC jurisdiction;
5. Route cancellations and surcharges by Canadian carriers should be approved by the CTC in order to ensure efficiency and competition are maintained;
6. Conformity should be established between Canadian and U.S. limitations of liability;
7. Canadian and U.S. rail regulations must be compatible to encourage export traffic from Canada to the U.S. including better liaison and bilateral agreements;
8. The Transport Canada review on section 279 of the *Railway Act* and the CTC interswitching inquiry should be coordinated.

D.30 GOVERNMENT OF THE PROVINCE OF MANITOBA

D.30.1 General

The Government of the Province of Manitoba presented to the inquiry a written submission only outlining their concerns in the matter of the implications of Staggers. They stated that rail operations within the province are an integral part of the Manitoba economy and any action prejudicing Canadian rail operations is of great concern to the province.

D.30.2 Potential Scope of Staggers Impact

The province stated that while there is concern for the negative effects of Staggers, there is also concern for the further deregulation of Canadian railways resulting therefrom. Staggers, however, has not been in effect long enough to establish a set pattern of the deregulated environment.

It was also stated that the economic recession in both Canada and the United States may have had a much more profound effect on the rail industry than did Staggers. For instance, U.S. rail carriers who now have a surplus of supply, may be offering low rates in order to attract and maintain shippers' business. Any reluctance by Canadian shippers to meet this competition could have the effect of cutting off U.S. markets to Canadian shippers.

D.30.3 Evidence of Staggers Effects

No evidence was presented by the Province of Manitoba.

D.30.4 Position on Legal Issues

The province stated that they were in agreement with the position of CN and CP with respect to reaffirming concern with the extra-territorial application of U.S. anti-trust laws. They further stated that bilateral discussions should include a complete review of international rail regulatory problems.

With respect to Canadian railways being permitted to cancel routes and surcharge joint international rates, the submission expressed that such permission be granted only as a last resort following a shortfall in bilateral negotiations and detailed impact analysis.

The province is opposed to confidential contracts, rebates and discounts as they potentially promote unjust discrimination between shippers and geographic areas and may result in the elimination of rate groupings for specific commodities.

According to the submission, Manitoba opposed the amending of section 287 of the Railway Act which would eliminate CTC jurisdiction on overhead movements through Canada.

With respect to the amending of General Orders T-5 and T-6 concerning liability conditions, it was stated that there would appear to be no serious implications by so doing provided that shippers have the option of accepting or declining such liability conditions.

The province concluded that they were not in support of the concept of unpublished rates, rebates and discounts in Canada as they would potentially result in preferential treatment for large volume shippers and inhibit the growth of smaller shippers. There also exists the possibility should such measures be enacted, that current legislation would not be able to offer relief in the event of discriminatory carrier actions.

D.30.5 Recommendations of the Government of Manitoba

The province stated that no action should be taken with respect to the issue of alleged lost revenues by the railways until the impact of these lost revenues is conclusively established. Corrective action should be considered in light of long term effects on shippers, market access, the rail carriers, trade, and rail employment in Canada.

With respect to route cancellations and surcharges, it was recommended that the interests of shippers should be protected by the CTC being empowered to make the final decision in these matters.

It was further stated that any review involving transportation policy should include a complete analysis of all issues in conjunction with an analysis of the entire transportation system. Such specific issues should include the impact of deregulation, collective pricing, developmental freight rates, improvements to section 23 of the National Transportation Act, an effective rate arbitration process, a lower maximum rate formula, expanded rail interswitching limits, joint track usage, and extended use of joint rates.

In conclusion, it was stated that dialogue between the U.S. Department of Transport and Transport Canada should be encouraged in developing Canada-U.S. transport policy. It was also recommended that a joint ICC/CTC Committee be established to review matters relating to dispute concerning international traffic.